IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

NUMBER 457

HORACE INGRAM, L. E. SMITH,
MARY PARKS LAW AND RUFUS JENKINS,

Petitioners in Certiorari

VS.

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

WESLEY R. ASINOF
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Now comes Horace Ingram, L. E. Smith, Mary Parks Law and Rufus Jenkins, petitioners in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioners were indicted by the United States Grand Jury for the Northern District of Georgia, along with other persons (31 defendants) on a three count indict-

ment. Count number 1 charged a conspiracy between the named defendants and other persons to unlawfully, willfully and knowingly attempt to evade and defeat the taxes imposed by Sections 4401 and 4411, Title 26, U.S.C. and to attempt to evade and defeat the payment thereof, (wagering taxes). Count two charged petitioners and others with engaging in the business of accepting wagers and conducting a lottery for a profit without paying the special tax. Count three charged petitioners and others with engaging in the business of accepting wagers and conducting a lottery for a profit without registering.

Petitioners and 22 other defendants were placed on trial before a jury, a severance having been granted to three of the defendants, John Elmer Ingram, Charles Harold Echols and Hill Tallent, one of the defendants, Sanchez McDowell, remained a fugitive and another, Clarence Walker, was dismissed from the indictment on motion of the government at the commencement of the trial.

The evidence on behalf of the government centered around a garage located at 1492 Howell Mill Road, in Atlanta, Georgia. On March 27, 1957, a number of federal agents from the Intelligence Division of the Treasury Department, accompanied by investigators from the office of the Solicitor of the Criminal Court of Fulton County, raided this garage, known as Ingram's Garage. Five of the alleged conspirators were present at the time of the raid and a sixth, Rufus Jenkins, came upon the scene later. In the garage the agents found numerous items consisting of scratch pads, paper sacks, card tables, police radios and other items contended by the government to be paraphernalia used in the operation of a lottery.

On September 20, 1956, about six months prior to the raid on Ingram's Garage, petitioner L. E. Smith, defendant Eugene Thomas and petitioner Mary Parks Law were arrested at a residence located in Forsyth County, Georgia, in company with defendants John Elmer Ingram and Charles Harold Echols who were not being tried at this time, and were all charged with the State charge of operating a lottery known as the number game. All those persons later plead guilty to the charge in state court and were fined.

The evidence on behalf of the government further tended to show that Horace Ingram, one of the petitioners, had on several occasions been seen to have given sums of money to police officers of the City of Atlanta who were also indicted and tried as alleged co-conspirators in the case. However, all of the eight police officer defendants who were being tried, J. W. Ellington, Paul Frank Bennett, Gene Paul Hicks, Clyde Edwin Carter, George H. Wade, George W. Slate, Roy H. Flemming and Foster Ellington were all acquitted; seven of them by the jury and the other, J. W. Ellington, by judgment of acquittal by the court at the conclusion of all the evidence in the case.

The evidence on behalf of the government further tended to show that some of the named defendants who were being tried, namely Richard Lee Turner, John Hill, Jr., Will Smith and Tommy Reid were what is known as "pick-up men" in the operation of a lottery. The court, at the conclusion of all the evidence in the case granted judgments of acquittal as to all four of these defendants on substantive counts two and three. Two of these defendants, Tommy Reid and Will Smith, were acquitted by the jury on the remaining conspiracy count.

The evidence for the government showed that John Elmer Ingram, one of the defendants who had been granted a severance and was not then being tried, on or about the month of August, 1956, had accepted some wagers from a witness by the name of Rutherford. However, this witness also testified that he did not know who John Ingram was turning these wagers in to, or who was the actual "banker".

There was further evidence by the government to the effect that petitioner Horace Ingram had, on one occasion, threatened two City of Atlanta police officers, R. M. Clarke and R. T. Appling, by telling them to leave him alone or he would have them moved off his beat and that this petitioner had also made some incriminating admissions to these officers pertaining to being in the lottery business.

At the conclusion of the evidence in chief on behalf of the government, the government moved for a judgment of acquittal as to defendants Hollis, Gresham, Freeman and Williams, and the court granted these motions.

Motions for judgments of acquittal were made on behalf of all the defendants at the conclusion of the evidence for the government and renewed at the close of all the evidence in the case. With the exception of the motions heretofore stated to have been granted, the motions were overruled by the court.

The United States Court of Appeals for the Fifth Circuit, in affirming the conviction for conspiracy ruled that "None of the appellants had paid a wagering tax or registered as the statute required, nor had any of the others connected with the enterprise done so." The Court of Appeals further held that "All of them, (appellants),

however, were identified with and active in the carrying on of the numbers game."

"The pick-up men and the headquarters personnel, if neither bankers nor writers, are not liable for the tax and are not required to register." The Court of Appeals then held that "With a factual situation such as the evidence here discloses, it will not be presumed nor was the Government required to prove that the tax which was payable had not been paid."

A petition for rehearing was filed by petitioners, and denied by the United States Court of Appeals.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on August 27, 1958. A Petition for rehearing was denied September 23, 1958. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U. S. 661, 666, 54 S. Ct. XXXIX).

(b) The statutes of the United States, the validity of which are involved in this application for certiorari, are as follows:

26 U.S.C.A. § 4401. IMPOSITION OF TAX

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an

amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U.S.C.A. § 4411. IMPOSITION OF TAX

There shall be imposed a special tax of $50.00 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C.A. § 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprison-

ed not more than 1 year, or both, together with the cost of prosecution.

18 U.S.C.A. § 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(c) This petition for certiorari is being filed in this court within 30 days from the date of the judgment denying the petition for rehearing.

(d) The nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

1.

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

2.

The United States Court of Appeals for the Fifth Circuit has misconstrued a decision of this Court involving

a construction of a statute of the United States, and has, by its ruling, permitted the conviction of a lottery pick-up man and other headquarters personnel to stand on a charge of conspiring to evade and defeat the payment of wagering taxes without evidence of their liability for the payment of such occupational and excise taxes or evidence of their knowledge of its evasion by the principal banker.

3.

The United States Court of Appeals for the Fifth Circuit has decided a question of gravity and importance in the administration of federal criminal justice involving federal conspiracy trials as it relates to the conviction of persons for conspiracy where such persons can not be legally held accountable for the substantive offense, alleged to have been the object of the conspiracy.

4.

The United States Court of Appeals for the Fifth Circuit has misconstrued the decision of this Court in the case of *Spies v. United States*, 317 U. S. 492, and that of *United States v. Calamero*, 354 U. S. 351.

THE QUESTIONS PRESENTED

1. The United States Court of Appeals for the Fifth Circuit erred in deciding that where pick-up men or headquarters personnel employed in the operation of a lottery in violation of state law are exempted by the act of congress from the registrational and taxing provisions of the federal wagering tax act, they can be lawfully convicted in federal court for conspiring with the person liable for the payment of the tax, namely, the banker, to

evade and defeat the payment thereof, a felony, where the evidence implicating such pick-up man or headquarters personnel in the alleged conspiracy showed nothing more than his act of picking up such lottery tickets and his concealment of his acts from State authorities, and fails to show his knowledge that the alleged banker had not paid the tax due the United States Government.

2. The Court of Appeals erred in deciding and ruling that a conviction in federal court can lawfully stand in such a case where the record in the case is silent, and no evidence is offered by the government to prove, that the pick-up man or headquarters personnel had knowledge that the banker had not paid the tax due the government.

3. Since this Court held in *United States v. Calamero*, supra, that the tax and reporting requirements of the Federal Wagering Tax Act did not apply to all employees of gambling enterprises, but only to those persons actually "engaged in receiving wagers" and this indictment in this case was drawn and returned by the grand jury prior to such decision by this court, the Court of Appeals erred in holding in effect that the *felony* conviction of such employee for conspiring to evade and defeat the payment of such tax may stand on the same evidence which would have so authorized and demanded his acquittal on the substantive *misdemeanor* offense of failing to register and pay the tax.

4. Does the ruling of this Court in the case of *Spies v. United States*, 317 U. S. 492, holding evidence of concealment to be sufficient to raise the offense of failure to pay a tax, a misdemeanor, into the felony of evading and defeating the payment thereof, (substantive offenses) apply to a situation so as to hold

a person who is otherwise not liable to the payment of a wagering tax guilty of a conspiracy to evade and defeat the payment thereof on mere evidence that one or more of the parties to such gambling enterprise concealed some of their activities?

5. The Court of Appeals erred in holding and deciding that where certain parties to a gambling enterprise, such as pick-up men and headquarters personnel, are exempted from taxing and reporting requirements of federal law, they can be lawfully convicted of conspiring to violate such law with their principal without evidence of some ingredient in addition to the wagering contract.

6. The United States Court of Appeals for the Fifth Circuit held in this case as follows:

> "It is a federal offense to engage in accepting wagers without payment of the tax and registering. From the evidence the jury could have found and apparently did find that the appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection, prosecution and punishment. So also the jury could have found and apparently did find that the activities were carried out with the further purpose of evading and defeating the Federal Statutes requiring payment of the tax and registering."

The Court of Appeals, in so holding and deciding, erred in that there was no evidence in the record to show any such purpose on the part of the petitioners to evade and defeat the federal statutes requiring payment of the tax and registration.

7. The United States Court of Appeals for the Fifth Circuit, in holding and deciding that the evidence in the case was sufficient to show a conspiracy on the part of the

petitioners to evade and defeat the payment of federal taxes inasmuch as the evidence showed appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection, prosecution and punishment, overlooked and misconstrued the controlling principle of the ruling of the Supreme Court in the case of *United States v. Calamero*, 354 U. S. 351, holding as follows:

> "We can give no weight to the Government's suggestion that holding the pick-up man to be not subject to this tax will defeat the policy of the statute because its enactment was 'in part motivated by a congressional desire to suppress wagering.' The statute was passed, and its constitutionality was upheld, as a revenue measure, United States v. Kahriger, 345 U. S. 22, and, apart from all else, in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt."

The Court of Appeals overlooked the controlling principle of this case, to-wit: That the appellants, in acting as employees of the banker in the operation of the lottery, were exempt from the taxing and registrational provisions of the Federal Wagering Tax Act, and, the evidence being silent as to knowledge by such employee of the failure of the banker to pay his federal tax, the mere act of the employee in picking up lottery tickets or checking them at a headquarters would not tend to prove the conspiracy to evade and defeat payment.

8. The United States Court of Appeals for the Fifth Circuit erred in applying and extending the principle of law held by this Court in the case of *Spies v. United States*, 317 U. S. 492, in that the holding of this Court in

the Spies case, supra, is completely inapplicable to the facts and the law in the case at bar.

The Spies case, supra, was a prosecution for the *substantive* offense of the felony for the attempt to evade and defeat the payment of federal tax. The real issue before the Court was the distinction between such felony charge and that of the willful failure to pay the tax. In pointing out the distinguishing elements of the greater from the lesser offense this Court held that

> "Willful but passive neglect of the statutory duty may constitute the lesser offense,"

but that in order to raise the lesser offense to the degree of the named felony

> "Congress intended some willful commission *in addition* to the willful omissions that make up the list of misdemeanors." (Italics added.)

This Court then further defined the felony to have been made out by showing the commission of the misdemeanor and to

> "combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

The Court of Appeals erroneously misapplied the principle of the Spies case to the facts of the case at bar by holding the concealment to be proof of the conspiracy charge against defendants who otherwise would have violated no federal law, either substantive or conspiratorial, whereas the only legitimate use of the evidence of concealment, according to the Spies case, would have been to have raised a *substantive* misdemeanor to a *substantive* felony. A further fallacy of the holding of the Court of Appeals is that the evidence of concealment in the Spies case was used *in addition to and in aggravation* of the

already made out misdemeanor case, whereas in the case at bar evidence of concealment was used *to make out* a felony conspiracy where no misdemeanor existed prior thereto, either substantive or conspiratorial.

9. The United States Court of Appeals for the Fifth Circuit erroneously broadened and extended the magnitude of conspiracy prosecutions by:

(a) Overlooking the law that the operation of a lottery is not a violation of federal law, and that a conspiracy to operate a lottery is not a violation of federal law, but that in order to fasten federal liability upon one alleged to have been a member of a conspiracy such as that charged in the indictment in the case at bar it would have been necessary that the Government prove such defendant to have entered into an agreement to evade and defeat the payment of the federal tax due; not that they were merely banded together for the purpose of operating a lottery.

(b) Recognizing that acts of concealment of the lottery activities by some of the members of the group charged with the offense to amount to sufficient proof that the entire group have done so for the purpose of one of them (the banker) to evade and defeat the payment of the federal wagering taxes due.

(c) Overlooking the principle of law that proof of concealment by those alleged to have been members of the conspiracy is not, and cannot, be proof of the fact of the unlawful agreement *unless the concealment is alleged and shown by the evidence to have been one of the objects of the conspiracy*, and that the participants *agreed to conceal* their activities in order to further the conspiracy.

(d) Overlooking the law that the gist of conspiracy to evade and defeat the payment of federal tax on wagers is the *agreement to evade the tax;* not the agreement to operate a lottery in violation of the law of the State, and that a conviction for the offense charged is not supported by the evidence where the evidence fails to show by any competent proof that the alleged conspirators, or some of them, *knew* that the person liable for the payment of the tax, the banker, had willfully attempted to evade the payment thereof by some affirmative act or acts.

10. The United States Court of Appeals for the Fifth Circuit overlooked and misconstrued the controlling principle of law enunciated by this Court in the Grunewald case, 353 U. S. 391, to the effect that acts of concealment by the conspirators, where not shown by the evidence to have been one of the objects of the original conspiracy, do not become a part thereof so as to continue the life of the conspiracy, or to give life to one that never did, in fact, really live.

11. The United States Court of Appeals for the Fifth Circuit in effect ruled erroneously that the operation of a lottery in violation of State law was a violation of federal law, so long as the federal tax was not paid, and erroneously ruled that the Government did not have to prove that the federal tax had not been paid. Petitioners respectfully submit that this is an erroneous interpretation of the law, and that just the opposite is true, to-wit: that the operation of a lottery is not a violation of the federal law, but that if one is operated a tax must be paid to the government, and that if such tax is not paid the gist of the offense is the failure to pay the tax; not the operation of the lottery. Consequently, the gist of the of-

fense of conspiracy to violate this same federal law is the *unlawful agreement to evade and defeat the payment of the tax*. In other words, it would not be necessary for the government to prove that all the conspirators were in the lottery enterprise as a prerequisite to a conviction for conspiracy; it would only be necessary for the government to prove that the conspirators agreed to attempt to evade and defeat the payment of the wagering taxes owed by another person who was in the lottery enterprise as a banker or writer.

APPENDIX

Petitioners herein append to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1957

No. 17,012

D. C. Docket No. 21234 Criminal

HORACE INGRAM, FRANK CHRISTIAN, L. E. SMITH, MARY PARKS LAW, RUFUS JENKINS, RICHARD LEE TURNER, ROBERT LEE LEWIS, SR., and JOHN HILL, JR.,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before Hutcheson, Chief Judge, and Jones and Wisdom, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 27, 1958.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17,012

HORACE INGRAM, FRANK CHRISTIAN, L. E. SMITH, MARY PARKS LAW, RUFUS JENKINS, RICHARD LEE TURNER, ROBERT LEE LEWIS, SR., and JOHN HILL, JR.,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(August 27, 1958.)

Before HUTCHESON, Chief Judge, and JONES and WISDOM, Circuit Judges.

JONES, Circuit Judge: Thirty-one persons were indicted for conspiring to evade and defeat the payment of the wagering taxes imposed by 26 U.S.C.A. §§ 4401 and 4411. Twenty-one of these persons were also charged

with the substantive offenses of accepting wagers without paying the special tax imposed by 26 U.S.C.A. (I.R.C. 1954) § 4411 in violation of 26 U.S.C.A. (I.R.C. 1954) § 7203, and with engaging in the business of accepting wagers without registering as required by 26 U.S.C.A. (I.R.C. 1954) § 4412 in violation of 26 U.S.C.A. (I.R.C. 1954) §7272. Two of the defendants, Horace Ingram and Rufus Jenkins, were convicted on all three counts. These and eight others were convicted on the conspiracy charge. Two of the eight were given probation and the others were sentenced for terms varying from a year and a day to three years. The two defendants who were convicted on three counts were sentenced to five years on the conspiracy charge and one year for failure to pay the tax. They were fined $25.00 for failing to register. The defendants who were sentenced to imprisonment have appealed. Ingram and Jenkins appeal from their conviction and sentence on the substantive charges as well as from their conviction and sentence on the conspiracy count. However, no error is specified and no argument is made as to the convictions on the substantive charges. We will disregard and treat as abandoned the appeal from the convictions on the second and third counts of the indictment. U. S. Ct. App. 5th Cir. Rule 24, Par. 2 (b), 28 U.S.C.A.

The trial lasted nineteen days and the record exceeds thirty-three hundred pages. The evidence connected the appellants with a rather large scale lottery or numbers operation. None of the appellants had paid a wagering tax or registered as the statute required, nor had any of the others connected with the enterprise done so. The

participants in such an operation have been described by the Supreme Court:

> "A numbers game involves three principal functional types of individuals: (1) the 'banker', who deals in the numbers and against whom the player bets; (2) the 'writer', who, for the banker, does the actual selling of the numbers to the public and who records on triplicate slips the numbers sold to each player and the amount of his wager; and (3) the 'pick-up man', who collects wagering slips from the writer and delivers them to the banker. If there are winnings to be distributed the banker delivers the required amount to the writer, who in turn pays off the successful players." *United States v. Calamaro*, 354 U. S. 351, 77 S. Ct. 1138, 1 L. Ed. 2d 1394.

The appellants, with candor, concede that there is evidence tending to prove that Ingram was a banker. Of the others, the appellants say, "Some of them can be classified as no more than headquarters personnel, some as pick-up men, and as to others the evidence fails to show any particular category." The conviction of Jenkins of the charges contained in the second and third counts of the indictment indicates that he was regarded by the jury as a principal in the enterprise. As to the others, we think the appellants' statement is a fair thumbnail appraisal of the effect of the evidence. All of them, however, were identified with and active in the carrying on of the numbers game.

The pick-up men and the headquarters personnel, if

neither bankers nor writers, are not liable for the tax and are not required to register. *United States v. Calamaro, supra.* The appellants tell us that it is necessary, in the operation of a numbers game, that there be pick-up men and headquarters personnel as well as bankers and writers. These persons violate no Federal law in following their occupations and hence proof of the things done by them in the gambling enterprise, so the appellants urge, is not evidence of a conspiracy to evade and defeat the payment of the wagering tax.

Much of the activity of the group who took part in the operation of the venture occurred in or stemmed from Horace Ingram's Garage in Atlanta, Georgia, referred to by Government counsel as the "money headquarters" or "city headquarters" to distinguish it from the "check-up headquarters" which was out of the city. We shall not undertake to relate the parts played by each of the actors who were engaged in the lottery scheme. It is clear enough that there was a large scale gambling enterprise being conducted and that each of the appellants had a part in it. The operation of a lottery is a criminal offense under the law of Georgia. Ga. Code. §§ 26-6501, 26-6502. There was evidence that each of the appellants had violated the Georgia law. *Lay v. State,* 85 Ga. App. 315, 69 S.E. 2d 583. In addition to the evidence which identified the appellants as being engaged, in one capacity or another, in the lottery project, there was testimony showing that motor vehicles were registered in the names of non-existing or deceased persons at fictitious addresses, that one or more of the vehicles used in the business had been repainted in a different color or colors, that cars had been "souped-up" so as to permit escape or

avoid surveillance, that a truck had been fitted with a secret compartment for the transporting of lottery tickets and other gambling paraphernalia, and that round-about routes were frequently traveled and often changed in carrying on the business of the lottery. That the evidence shows violations of the Georgia law and a concert of effort to escape detection in such violations is tacitly conceded by the appellants; but, they say, there is no evidence of any agreement or concert of action to evade and defeat the payment of the tax owing to the United States. The appellants contend that the convictions cannot stand unless it appears that they knew a tax was payable, that they knew it had not been paid, and that their activity was done with an intent to evade and defeat the payment of it.

It is a Federal offense to engage in accepting wagers without payment of the tax and registering. From the evidence the jury could have found and apparently did find that the appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection, prosecution and punishment. So also the jury could have found and apparently did find that the activities were carried out with the further purpose of evading and defeating the Federal Statutes requiring payment of the tax and registering. It was not necessary that the Government prove that the appellants knew of the statute. *Cruz v. United States*, 10th Cir. 1939, 106 F. 2d 828. With a factual situation such as the evidence here discloses, it will not be presumed nor was the Government required to prove that the tax which was payable had not been paid. Conspirators are held to have intended the consequences of their acts, and by

purposely engaging in a conspiracy which necessarily and directly produces a prohibited result they are, in contemplation of law, chargeable with intending that result. *United States v. Patten*, 226 U. S. 525, 33 S. Ct. 141, 57 L. Ed. 333, 44 L.R.A. N.S. 325. "The conspiracy is the crime and that is one, however diverse its objects." *Frohwerk v. United States*, 249 U. S. 204, 39 S. Ct. 249, 63 L. Ed. 561; *United States v. Manton*, 2nd Cir. 1938, 107 F. 2d 834; cert. den., 309 U. S. 664, 60 S. Ct. 590, 84 L. Ed. 1012.

The question as to whether the conspiracy was for the purpose of evading and defeating the requirements of the Federal law was for the jury and the jury's verdict has resolved the question. It is immaterial whether there was another purpose or purposes and whether such other purposes were legal or illegal. *Spies v. United States*, 317 U. S. 492, 63 L. Ed. 364, 87 L.Ed. 418; *Kobey v. United States*, 9th Cir. 1953, 208 F. 2d 583.

One other question remains for disposition. The appellants state it in these words:

> "The gist of the conspiracy in this case is the agreement to violate the Wagering Tax Act. In order to fasten liability upon any person for this tax a wagering agreement must first be entered into between a bettor and a banker. The Act, therefore, necessarily contemplates more than one person be involved. However, Congress has seen fit to impose no tax liability upon any person in this enterprise other than the banker and a writer employed by him. The bettor or player, the pickup man and the other

various and sundry employees of the banker or writer are all exempted, by the Act of Congress, from paying tax. In such cases as these, there can be no conviction for a conspiracy merely to enter into such an agreement unless there is also an ingredient in addition to the wagering contract, for the mere doing of the substantive act in such case must stand or fall on whether the law imposes a penalty for such substantive act. In other words a conspiracy case can not be made out against one who could receive no penalty for the substantive offense, unless an additional ingredient is also present."

In support of their contention the appellants rely upon the rule that an agreement between buyer and seller, without more, does not establish a conspiracy for an illegal sale of liquor. *United States v. Katz*, 271 U. S. 354, 46 S. Ct. 513, 70 L. Ed. 986. A like analogy is drawn from the holding that a woman could not be convicted of conspiring to violate the Mann Act when she was the person to be transported with her consent across a state line unless some other ingredient was present. *Gebardi v. United States*, 287 U. S. 112, 53 S. Ct. 35, 77 L. Ed. 206, 84 A.L.R. 370. If this were a case where one who had purchased a lottery ticket was contending that he could not be convicted of being a conspirator the argument might be persuasive. It is not such a case. The charge is not that of carrying on a lottery. It is of a conspiracy to evade and defeat the payment of the wagering tax. The proof was sufficient.

Since we fail to find merit in the appeal, the judgment of the district court is

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By: GILBERT F. GANUCHEAN

Deputy

New Orleans, Louisiana

(SEAL)

FILE COPY

No. 457

In the Supreme Court of the United States

OCTOBER TERM, 1958

HORACE INGRAM, L. E. SMITH, MARY PARKS LAW AND RUFUS JENKINS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
ROBERT G. MAYBACK,
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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 457

HORACE INGRAM, L. E. SMITH, MARY PARKS LAW AND RUFUS JENKINS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 3379–3386; Pet. App. 17–24) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1958 (R. 3387; Pet. App. 16). A petition for rehearing was denied on September 23, 1958 (R. 3388–3392). The petition for a writ of certiorari was filed on October 20, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

tion 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U. S. C. (Supp. V) 7272, 68A Stat. 866, provides:

Penalty for failure to register.

(a) *In general.*

Any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

18 U. S. C. 371 provides:

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

Petitioners, together with 27 others, were charged in count 1 (R. 1–14) with a conspiracy to evade and defeat the payment of the wagering taxes on lottery "numbers" operations, imposed by 26 U. S. C. (Supp. V) 4401 and 4411, in violation of 26 U. S. C. (Supp. V) 7203 (*supra,* pp. 2, 3). Eighteen of these defendants, including the four petitioners, were charged in count 2 (R. 14) with the substantive offense of accepting wagers without paying the special tax imposed by 26 U. S. C. (Supp. V) 4411, in violation of 26 U. S. C. (Supp. V) 7203 (*supra,* pp. 3, 4); and in count 3 (R. 14–15) with engaging in the business of accepting wagers without registering as required by 26 U. S. C. (Supp. V) 4412, in violation of 26 U. S. C. (Supp. V) 7272 (*supra,* pp. 3, 4).

Petitioners Ingram and Jenkins were found guilty on all three counts, and were sentenced to imprisonment for five years on the conspiracy count, imprisonment for one year under count 2, and a $25.00 fine under count 3 (R. 3350, 3354, 3358, 3362). Petitioners Smith and Law were found guilty only on the conspiracy count, and each was sentenced to imprisonment for three years (R. 3352, 3353, 3360, 3361). On their appeals, together with those of a number of other defendants (R. 3368–3371), the convictions were affirmed (R. 3387; Pet. App. 16).

The record is voluminous, but pertinent evidence adduced at the trial may be briefly summarized as follows:

Internal Revenue agents, Georgia state investigators, and a newspaper reporter for the "Atlanta

Constitution" had been conducting surveillance of the four petitioners and other defendants in Atlanta, Georgia, during the period between 1954 and 1957. This surveillance showed that petitioners and others, during the hours when lottery headquarters are customarily visited, picked each other up in automobiles, and took circuitous routes in driving outside Atlanta, speeding away to "shake" the agents following them (R. 212, 213, 216, 220–224, 228–229, 235, 237, 253, 261–262, 289, 290, 291, 307, 313, 316, 318, 323, 694, 743–744, 746, 747, 2542–2563, 1317–1322).

Co-conspirator Allen testified that in 1955 he worked as a pick-up man for Ingram at $40 per week, and that he would pick up lottery tickets and place them in a "stash" which was changed from time to time (R. 2246–2249). Sometimes Allen would deliver lottery tickets to Ingram, Law, and Smith outside the city. The meeting place would be changed each month (R. 2249–2250, 2256–2258).

In the fall of 1955, Ingram told state investigators Little and Carter that there were others in the lottery business in Atlanta besides him, and asked why they did not "try to catch some other lottery men". Ingram stated that the investigators were not going to catch him around any lottery; that the investigators following his men had caused him to "change cars as many as five times in one day"; and that others were taking away his business, which had been reduced to $3,500 per day (R. 1024, 1027–1028).

On December 1, 1955, defendant Turner was apprehended in the act of transporting a number of sacks of lottery tickets in a hidden compartment of a red

Ford truck (R. 757–761, 2317–2322). While this truck was stopped, Ingram and Smith drove by and were pursued, but not caught, by a police officer (R. 759–760, 2319–2320). On December 10, 1955, Turner pleaded guilty to a state charge of lottery in DeKalb County, Georgia, and his $1,000 fine and attorney's fee were paid by petitioner Smith (R. 1762–1764). Turner informed investigator Carter that petitioner Ingram would pay for his bond and fine for the lottery offense (R. 774, 776).

The Ford truck used by Turner, then painted green, was driven by defendant McDowell when he was stopped by investigator Carter on June 22, 1955 (R. 757, 776–777, 891). During 1955, for a time, this truck was painted a third color (black) and was regularly used by co-conspirator Allen and defendant Turner (R. 2254–2256, 2384). Ingram paid for the servicing of this truck and several other cars, especially adjusted for faster acceleration, at a service station operated by defendant Ellington (R. 2380, 2383–2384, 2387–2389).

On December 24, 1955, police sergeant Slate told officers Clark and Appling that Ingram said that they should come over to his garage to get a ham and a fifth of whiskey. Slate said that Ingram was "good to policemen", and that all the "Big Boys" were at Ingram's garage, with "about forty-five down there today" (R. 1865–1866, 2133–2135). Police officers carrying presents of ham and whiskey were seen leaving Ingram's garage in December 1955 (R. 1669–1670, 2265).

Witness Rutherford testified that during 1956, for a period of about four months, he placed lottery bets several times a week with defendant John Elmer Ingram. In August 1956, this defendant asked Rutherford to plead the Fifth Amendment and not testify against him (R. 2230–2232).

In the summer of 1956, petitioner Horace Ingram spoke to officer Appling about how defendants Turner and Williams assisted in his lottery operations. Ingram compared his lottery business with that of another Atlanta lottery operator (R. 2009, 2110, 2120–2124). In the fall of 1956, Ingram, angered by the fact that his son had been given a speeding ticket, offered to bet police officers Clark and Appling $1,000 that they would not remain on their beat after that week. Ingram stated, "I've got more power and more politics than either one of you". A few days later the officers were transferred to a beat in a different part of the city (R. 1847–1849, 1851, 2006–2007).

On September 20, 1956, petitioners Smith and Law, using fictitious names, together with three other defendants, were apprehended with equipment and paraphernalia in a raid at a lottery headquarters in Forsyth County, Georgia, after which they entered pleas of guilty to the accusations under state lottery charges (R. 1090–1091, 1094–1097, 1122, 1169, 1195–1198, 1201, 1222).

In the early part of 1957, surveillance was centered around Ingram's garage, a headquarters of the lottery. The window to the office of the garage was made of a special glass which "permits vision from the inside

out but prohibits vision from the outside into the building", and the doors were equipped with double locks (R. 30–31). Motion pictures were taken of the activities around the garage and showed frequent visits by police officers in patrol cars (R. 694, 729, 732–733, 737).

On January 9, 1957 and March 25, 1957, petitioner Ingram was observed at the garage on three occasions, either handing money to a policeman or dropping money inside a police patrol car (R. 1177–1178, 1322–1323, 1587–1589, 1661–1663). On February 28, 1957, Ingram arrived at the garage with stacks of currency about one foot high (R. 1183, 1184).

On February 1, 1957, petitioner Jenkins and Ingram were seen counting two large rolls of bills in front of the garage (R. 1181, 1345). Jenkins was at the garage regularly, going in and out several times a day. He drove various persons, including defendant Hill, to and from the garage (R. 822–823, 1344, 1346–1347).

During this period, petitioner Smith was also observed going to and from the garage on regular occasions (R. 806–810). On March 8, 1957, Smith arrived at the garage with a covered box which he was carrying (R. 1334–1335). Several days later, he was observed carrying an adding machine from the garage office to an automobile (R. 1335–1336). On March 25, 1957, Smith was seen giving several bills to a Negro at the garage. Later that night, Smith took two heavy cloth sacks out of the office, put them in the trunk of an automobile, and drove off (R. 1337–1338).

The surveillance of the lottery operations culminated in a raid on Ingram's garage at 1492 Howell Mill Road in Atlanta on March 27, 1957 under a federal search warrant (R. 28–29, 193). The sum of $8,934.00 was seized from defendant Christian and $784.45 from petitioner Ingram (R. 144, 146). Also seized in the raid and introduced in evidence were a number of fictitious automobile registrations and items customarily used in lottery operations, including scratch pads, paper sacks, lottery ribbons, a lottery banker's record, coin wrappers, rubber bands, gem clips, card tables, and radios. Jenkins arrived later and was also arrested (R. 163, 164, 160–161, 71, 114, 208–211, 165–166, 172–173, 166–168, 156, 186, 823).

The Internal Revenue records for the years 1954 through 1957 inclusive showed that none of the defendants or co-conspirators had purchased a federal wagering tax stamp, had registered with the Director of Internal Revenue as persons engaged in the wagering business, or had paid a federal excise tax on wagers (R. 1991–1993, 2000–2003).

ARGUMENT

The various functions of the banker, writer and pick-up man in the operation of a numbers lottery, such as that here involved, are set forth in *United States* v. *Calamaro,* 354 U. S. 351, 353. In the court below, it was conceded that there was evidence tending to prove that petitioner Ingram was a banker (Pet. App. 19). The record clearly supports this conclusion, and Ingram does not claim here that he was

not a banker. The court below observed that the conviction of petitioner Jenkins on the two substantive counts indicated that the jury regarded him as a principal in the enterprise (Pet. App. 19). The evidence (*supra*, pp. 9, 10) indicates that he had a proprietary interest in the venture. Petitioners Smith and Law can be classified as headquarters personnel. Certain defendants who are not petitioners here (*e. g.*, Richard Lee Turner and John Hill, Jr.) were pick-up men. Under the *Calamaro* case, *supra*, pick-up men and personnel other than bankers, writers, and those having a proprietary interest in the lottery, are not considered as engaged in receiving wagers and are not subject to the annual $50 special occupational tax. The contentions of petitioners go only to the propriety of the conviction of those persons who were not themselves liable for the tax.

1. There is no merit to petitioners' contention that the evidence against the pick-up men and headquarters personnel showed only a conspiracy to violate the state lottery laws, as distinguished from a conspiracy to evade and defeat the payment of federal wagering taxes (Pet. 8–9, 14). The judge gave a comprehensive charge on the issue, to which no exceptions were taken. In part, he said:

> * * * The United States is not charging the defendants with the crime or misdemeanor of operating a lottery, and the jury will not concern itself as to whether or not there was a conspiracy to violate the laws of Georgia prohibiting the operation of a lottery, it being the province of the courts of this state, and its

officers, to enforce that law and to prevent its violation. The violation of a law, if there has been one in this case, and with which you are concerned, is the agreeing and conspiring among the defendants by affirmative, positive actions, to willfully and intentionally aid and assist any writer, if there was any, or any banker, if there was any, or any person having a proprietary interest in the operation of the lottery, to violate the law by defeating or evading the tax (R. 3321–3322).

* * * * *

Now I instruct you that where the evidence of the Government shows certain conduct on the part of the defendants, or any of them, in the handling of affairs, the likely effect of which would be to mislead or conceal, then it will be your duty to look to the evidence and determine the motive for such conduct, and if you should find that the motive for such conduct was for the sole purpose of concealing a lottery operation, then such conduct would not amount to acts of commission to defeat or evade the tax; however, if the tax evasion motive plays any part in such conduct the offense may be made out even though the conduct may serve other purposes, such as the concealment of the lottery from State officers, if you find that a lottery was being conducted (R. 3326–3327, 3344–3345).

Other parts of the charge required, as a prerequisite to conviction for conspiracy, the finding of an illegal agreement, express or implied, between the various defendants to evade and defeat the federal tax laws (R. 3305–3306, 3323, 3331).

Petitioners were obviously intent upon doing everything they could to keep the lottery in operation and to avoid its detection. They were concerned with avoiding detection by persons other than the local police (whom they apparently thought they could handle). The jury had the right to infer that this desire to conceal operations from all outside authorities embraced the federal tax authorities as well as state officers. No numbers business as large as this one would have been unaware of the federal tax due in 1955 and 1956, and the efforts which petitioners made to conceal their operations from authorities, federal and state, clearly amounted to an attempt to evade and defeat payment of the federal taxes under the rule of *Spies* v. *United States*, 317 U. S. 492. The Court of Appeals which affirmed this conviction has shown a sharp awareness of the distinction between mere failure to pay the tax and evasion. See *Clay* v. *United States*, 218 F. 2d 483 (C. A. 5). It properly found that the acts here went far beyond mere failure to pay.

2. There is no merit to the claim that, as to those not themselves liable for the tax, the proof failed to show that they knew the tax had not been paid. The two petitioners in that category were persons working at headquarters, at the very heart of the operation. The jury had strong reason to infer that they knew that the secrecy of their operations meant concealment from federal authorities, as well as state officials, and that the venture in which they were engaged contemplated non-payment of federal taxes.

3. One incapable of committing a federal offense may nevertheless be guilty of conspiracy to commit such offense. *Gebardi* v. *United States*, 287 U. S. 112. Here, those petitioners not themselves liable for the tax were, as noted above, headquarters personnel engaged in the active conduct of the lottery. They were actively assisting their principals in violating the law and thus properly found guilty of conspiracy to violate the law.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1958

NO. 457

HORACE INGRAM, L. E. SMITH,
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Petitioners

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF PETITIONERS

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REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is officially reported in 259 Federal Reporter, 2nd Series, 886.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under

and by virtue of Title 18 U.S.C. 3772 and within the time provided for in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S. Ct. XXXIX), and Rule 22 (2) of the Supreme Court Rules.

Jurisdiction of this court is invoked because the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision, and has misconstrued a decision of this court involving a construction of a statute of the United States, and has, by its ruling, permitted the conviction of a lottery pick-up man and other headquarters personnel to stand on a charge of conspiring to evade and defeat the payment of wagering taxes without evidence of their liability for the payment of such occupational and excise taxes or evidence of their knowledge of its evasion by the principal banker, and has decided a question of gravity and importance in the administration of federal criminal justice involving federal conspiracy trials as it relates to the conviction of persons for conspiracy where such persons can not be legally held accountable for the substantive offense, alleged to have been the object of the conspiracy, and has misconstrued the decisions of this Court in the case of Spies v. United States, 317 U.S. 492, and United States v. Calamero, 354 U.S. 351, all as provided for by rule 19 (1) (b) of the rules of the Supreme Court governing review by this court on certiorari and the grounds therefor.

The judgment of the Court of Appeals was entered on August 27, 1958. A petition for rehearing was denied September 23, 1958. The petition for certiorari was filed and docketed in the Supreme Court of the United States on October 20, 1958, within 30 days after the date of the final judgment of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing.

STATUTES INVOLVED

26 U.S.C.A. § 4401. IMPOSITION OF TAX

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U.S.C.A. § 4411. IMPOSITION OF TAX

There shall be imposed a special tax of $50.00 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C.A. § 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution.

18 U.S.C.A. § 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

THE QUESTIONS PRESENTED

1. The United States Court of Appeals for the Fifth Circuit erred in deciding that where pick-up men or headquarters personnel employed in the operation of a

lottery in violation of state law are exempted by the act of congress from the registrational and taxing provisions of the federal wagering tax act, they can be lawfully convicted in federal court for conspiring with the person liable for the payment of the tax, namely, the banker, to evade and defeat the payment thereof, a felony, where the evidence implicating such pick-up man or headquarters personnel in the alleged conspricay showed nothing more than his act of picking up such lottery tickets and his concealment of his acts from State authorities, and fails to show his knowledge that the alleged banker had not paid the tax due the United States Government.

2. The Court of Appeals erred in deciding and ruling that a conviction in federal court can lawfully stand in such a case where the record in the case is silent and no evidence is offered by the government to prove that the pick-up man or headquarters personnel had knowledge that the banker had not paid the tax due the government.

3. Since this Court held in *United States v. Calamero*, supra, that the tax and reporting requirements of the Federal Wagering Tax Act did not apply to all employees of gambling enterprises, but only to those persons actually "engaged in receiving wagers," and the indictment in this case was drawn and returned by the grand jury prior to such decision by this court, the Court of Appeals erred in holding in effect that the *felony* conviction of such employee for conspiring to evade and defeat the payment of such tax may stand on the same evidence which would have so authorized and demanded his acquittal on the substantive *misdemeanor* offense of failing to register and pay the tax.

4. Does the ruling of this Court in the case of *Spies v.*

United States, 317 U. S. 492, which holds evidence of concealment to be sufficient to raise the offense of failing to pay a tax, a misdemeanor, into the felony of evading and defeating the payment thereof, (substantive offenses), apply to a situation where a person not liable to the payment of a wagering tax may be guilty of a conspiracy to evade and defeat the payment thereof on mere evidence that one or more of the parties to such gambling enterprise concealed some of their activities?

5. The Court of Appeals erred in holding and deciding that where certain parties to a gambling enterprise, such as pick-up men and headquarters personnel, are exempted from taxing and reporting requirements of federal law, they can be lawfully convicted of conspiring to violate such law with their principal without evidence of some ingredient in addition to the wagering contract.

6. The United States Court of Appeals for the Fifth Circuit held in this case as follows:

> "It is a federal offense to engage in accepting wagers without payment of the tax and registering. From the evidence the jury could have found and apparently did find that the appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection, prosecution and punishment. So also the jury could have found and apparently did find that the activities were carried out with the further purpose of evading and defeating the Federal Statutes requiring payment of the tax and registering."

The Court of Appeals, in so holding and deciding, erred in that there was no evidence in the record to show any such purpose on the part of the petitioners to evade

and defeat the federal statutes requiring payment of the tax and registration.

7. The United States Court of Appeals for the Fifth Circuit, in holding and deciding that the evidence in the case was sufficient to show a conspiracy on the part of the petitioners to evade and defeat the payment of federal taxes inasmuch as the evidence showed appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection, prosecution and punishment, overlooked and misconstrued the controlling principle of the ruling of the Supreme Court in the case of *United States v. Calamero*, 354 U. S. 351, holding as follows:

> "We can give no weight to the Government's suggestion that holding the pick-up man to be not subject to this tax will defeat the policy of the statute because its enactment was 'in part motivated by a congressional desire to suppress wagering.' The statute was passed, and its constitutionality was upheld, as a revenue measure, United States v. Kahriger, 345 U. S. 22, and, apart from all else, in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt."

The Court of Appeals overlooked the controlling principle of this case, to-wit: That the appellants, in acting as employees of the banker in the operation of the lottery, were exempt from the taxing and registrational provisions of the Federal Wagering Tax Act, and, the evidence being silent as to knowledge by such employee of the failure of the banker to pay his federal tax, the mere act of the employee in picking up lottery tickets or checking them at a headquarters would not tend to prove the conspiracy to evade and defeat payment.

8. The United States Court of Appeals for the Fifth Circuit erred in applying and extending the principle of law held by this Court in the case of *Spies v. United States,* 317 U. S. 492, in that the holding of this Court in the Spies case, supra, is completely inapplicable to the facts and the law in the case at bar.

The Spies case, supra, was a prosecution for the *substantive* offense of the felony for the attempt to evade and defeat the payment of federal tax. The real issue before the Court was the distinction between such felony charge and that of the willful failure to pay the tax. In pointing out the distinguishing elements of the greater from the lesser offense this Court held that

> "Willful but passive neglect of the statutory duty may constitute the lesser offense,"

but that in order to raise the lesser offense to the degree of the named felony

> "Congress intended some willful commission *in addition* to the willful omissions that make up the list of misdemeanors." (Italics added.)

This Court then further defined the felony to have been made out by showing the commission of the misdemeanor and to

> "combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

The Court of Appeals erroneously misapplied the principle of the Spies case to the facts of the case at bar by holding the concealment to be proof of the conspiracy charge against defendants who otherwise would have violated no federal law, either substantive or conspiratorial, whereas the only legitimate use of the evidence of con-

cealment, according to the Spies case, would have been to have raised a *substantive* misdemeanor to a *substantive* felony. A further fallacy of the holding of the Court of Appeals is that the evidence of concealment in the Spies case was used *in addition to and in aggravation of* the already made out misdemeanor case, whereas in the case at bar evidence of concealment was used *to make out* a felony conspiracy where no misdemeanor existed prior thereto, either substantive or conspiratorial.

9. The United States Court of Appeals for the Fifth Circuit erroneously broadened and extended the magnitude of conspiracy prosecutions by:

(a) Overlooking the law that operation of a lottery is not a violation of federal law, and that conspiring to operate a lottery is not a violation of federal law, but that in order to fasten federal liability upon one alleged to have been a member of a conspiracy such as that charged in the indictment in the case at bar it would have been necessary that the Government prove such defendant to have entered into an agreement to evade and defeat the payment of the federal tax due; not that they were merely banded together for the purpose of operating a lottery.

(b) Recognizing that acts of concealment of the lottery activities by some of the members of the group charged with the offense to amount to sufficient proof that the entire group have done so for the purpose of one of them (the banker) to evade and defeat the payment of the federal wagering taxes due.

(c) Overlooking the principle of law that proof of concealment by those alleged to have been members of the conspiracy is not, and cannot, be proof of the fact of

the unlawful agreement *unless the concealment is alleged and shown by the evidence to have been one of the objects of the conspiracy*, and that the participants *agreed to conceal* their activities in order to further the conspiracy.

(d) Overlooking the law that the gist of conspiracy to evade and defeat the payment of federal tax on wagers is the *agreement to evade the tax;* not the agreement to operate a lottery in violation of the law of the State, and that a conviction for the offense charged is not supported by the evidence where the evidence fails to show by any competent proof that the alleged conspirators, or some of them, *knew* that the person liable for the payment of the tax, the banker, had willfully attempted to evade the payment thereof by some affirmative act or acts.

10. The United States Court of Appeals for the Fifth Circuit overlooked and misconstrued the controlling principle of law enunciated by this Court in the Grunewald case, 353 U. S. 391, to the effect that acts of concealment by the conspirators, where not shown by the evidence to have been one of the objects of the original conspiracy, do not become a part thereof so as to continue the life of the conspiracy, or to give life to one that never did, in fact, really live.

11. The United States Court of Appeals for the Fifth Circuit in effect ruled erroneously that the operation of a lottery in violation of State law was a violation of federal law so long as the federal tax was not paid, and erroneously ruled that the Government did not have to prove that the federal tax had not been paid. Petitioners respectfully submit that this is an erroneous interpretation of the law, and that just the opposite is true, to-wit: that the operation of a lottery is not a violation of the

federal law but that if one is operated a tax must be paid to the government, and that if such tax is not paid the gist of the offense is the failure to pay the tax; not the operation of the lottery. Consequently, the gist of the offense of conspiracy to violate this same federal law is the *unlawful agreement to evade and defeat the payment of the tax*. In other words, it would not be necessary for the government to prove that all the conspirators were in the lottery enterprise as a prerequisite to a conviction for conspiracy; it would only be necessary for the government to prove that the conspirators agreed to attempt to evade and defeat the payment of the wagering taxes owed by another person who was in the lottery enterprise as a banker or writer.

STATEMENT OF THE CASE

Petitioners were indicted by the United States Grand Jury for the Northern District of Georgia, along with other persons (31 defendants) on a three count indictment. Count one charged a conspiracy between the named defendants and other persons to unlawfully, willfully and knowingly attempt to evade and defeat the taxes imposed by Sections 4401 and 4411, Title 26, U.S.C. and to attempt to evade and defeat the payment thereof, (wagering taxes). Count two charged petitioners and others with engaging in the business of accepting wagers and conducting a lottery for a profit without paying the special tax. Count three charged petitioners and others with engaging in the business of accepting wagers and conducting a lottery for a profit without registering.

Petitioners and 22 other defendants were placed on trial before a jury, a severance having been granted to three of the defendants, John Elmer Ingram, Charles

Harold Echols and Hill Tallent. One of the defendants, Sanchez McDowell, remained a fugitive, and another, Clarence Walker, was dismissed from the indictment on motion of the government at the commencement of the trial.

The evidence on behalf of the government centered around a garage located at 1492 Howell Mill Road, in Atlanta, Georgia. On March 27, 1957, a number of federal agents from the Intelligence Division of the Treasury Department accompanied by investigators from the office of the Solicitor of the Criminal Court of Fulton County raided this garage, known as Ingram's Garage. Five of the alleged conspirators were present at the time of the raid and a sixth, Rufus Jenkins, came upon the scene later. In the garage the agents found numerous items consisting of scratch pads, paper sacks, card tables, police radios and other items contended by the government to be paraphernalia used in the operation of a lottery.

On September 20, 1956, about six months prior to the raid on Ingram's Garage, petitioner L. E. Smith, defendant Eugene Thomas and petitioner Mary Parks Law were arrested at a residence located in Forsyth County, Georgia, in company with defendants John Elmer Ingram and Charles Harold Echols who were not being tried at this time, and all were charged with the State offense of operating a lottery known as the numbers game. All those persons later plead guilty to the charge in the State court and were fined.

Horace Ingram, one of the petitioners, had on several occasions given sums of money to police officers of the City of Atlanta who were also indicted and tried as

alleged co-conspirators in the case. All eight police officer defendants who were tried, J. W. Ellington, Paul Frank Bennett, Gene Paul Hicks, Clyde Edwin Carter, George H. Wade, George W. Slate, Roy H. Flemming and Foster Ellington were acquitted; seven of them by the jury and the other, J. W. Ellington, by judgment of acquittal by the court at the conclusion of the evidence in the case.

Some of the defendants on trial, Richard Lee Turner, John Hill, Jr., Will Smith and Tommy Reid were what are known as "pick-up men" in the lottery. The court, at the conclusion of the evidence, granted judgments of acquittal as to all four of these defendants on substantive counts two and three. Two of these defendants, Tommy Reid and Will Smith, were acquitted by the jury on the remaining conspiracy count.

John Elmer Ingram, one of the defendants who had been granted a severance, on or about the month of August, 1956, had accepted some wagers from a witness by the name of Rutherford. This witness testified he did not know to whom John Ingram was turning in these wagers or who the actual "banker" was.

Petitioner Horace Ingram had, on one occasion, threatened two City of Atlanta police officers, R. M. Clarke and R. T. Appling, by telling them to leave him alone or he would have them moved off his beat and made admissions to these officers pertaining to his being in the lottery business.

At the conclusion of the evidence in chief on behalf of the government, the government moved for a judgment of acquittal as to defendants Hollis, Gresham, Freeman and Williams, and the court granted these motions.

Motions for judgments of acquittal were made on behalf of all the defendants at the conclusion of the evidence for the government and renewed at the close of all the evidence. With the exception of the motions heretofore stated to have been granted the motions were overruled by the court.

The United States Court of Appeals for the Fifth Circuit, in affirming the conviction for conspiracy, ruled that "None of the appellants had paid a wagering tax or registered as the statute required, nor had any of the others connected with the enterprise done so." The Court of Appeals further held that "All of them, (appellants), however, were identified with and active in the carrying on of the numbers game."

"The pick-up men and the headquarters personnel, if neither bankers nor writers, are not liable for the tax and are not required to register." The Court of Appeals then held that "With a factual situation such as the evidence here discloses, it will not be presumed nor was the Government required to prove that the tax which was payable had not been paid."

A petition for rehearing was filed by petitioners, and denied by the United States Court of Appeals.

The Supreme Court of the United States granted certiorari.

SUMMARY OF ARGUMENT

1.

Petitioners were engaged in operating a lottery and concealed their activity. The Government failed to prove that the petitioners not liable for the payment of the

tax had knowledge that the person liable had failed to pay. Employees of a lottery principal or banker are not required to register or pay federal tax, and, as to them, they violate no federal law. The operation of a lottery is a violation of the Georgia State law, and those who engage in it are not in violation of federal law unless they conspire with person liable for tax to evade and defeat its payment. Concealment of lottery activity is an essential precaution to the successful existence of the State violation; hence it can not be inferred that concealment was for purpose of evading federal tax. The evidence in this case would have demanded the acquittal of all defendants except the banker on the substantive misdemeanor charge, therefore their acts of concealment do not authorize their conviction of the felony conspiracy.

2.

The ruling of this Court in the case of Spies v. United States, 317 U.S. 492, is not applicable to the facts of this case. The Spies case, supra, was a prosecution for the substantive offense and evidence of concealment was offered by the Government in that case to raise the offense from the misdemeanor of failing to pay the tax to the felony of evading and defeating its payment.

3.

The gist of the conspiracy in this case is the agreement to violate the Wagering Tax Act. Inasmuch as the agreement to wager is a necessary element of the Government's proof on a substantive charge of failing to pay the tax and this court, in United States v. Calamero, 354 U.S. 351, has held that employees of the banker are not required to pay the tax, there can be no conviction for

the conspiracy thereof without proof of some additional ingredient in addition to the wagering contract.

4.

The evidence that petitioners operated a lottery "with a common purpose of escaping detection, prosecution and punishment," as held by the Court of Appeals, was not sufficient to show they attempted to avoid federal authorities by such acts of concealment. Employees not subject to federal tax would have no motive to escape detection from federal authorities because they can not be prosecuted by them for operating such lottery without payment of the federal tax. Concealment of their activity from State authorities is necessary inasmuch as it is a violation of State law. If the federal tax had been paid and no conspiracy entered into by them to evade and defeat payment of the tax, concealment of their activity would have been just as essential as if the tax had not been paid.

5.

The acts of concealment have not been shown to have been one of the objects of the original conspiracy, but merely subsidiary thereto, the proof of which fails to illustrate or prove the main conspiracy. A subsidiary conspiracy to conceal is inherent in every crime requiring concert of action; therefore the concealment in this case fails to prove that the main conspiracy ever existed.

6.

The opinion of the Court of Appeals holding the Government is not required to prove that the tax has not been paid is error. The holding is inconsistent with the second portion of the opinion holding that the charge is

not the carrying on of a lottery, but a conspiracy to evade and defeat payment of tax. The two theories of the Court of Appeals are inconsistent and incompatible.

ARGUMENT

PART I.

CONCEALMENT NOT SUFFICIENT TO PROVE CONSPIRACY WHERE KNOWLEDGE NOT SHOWN.

The evidence in this case for the Government, although voluminous, is confined to proving that all the petitioners were engaged, in one capacity or another, in the operation of a lottery and that in carrying out the operation each of the petitioners had concealed their individual activities in order to escape detection, prosecution and punishment.

The petitioners contend that concealment of their activity was employed by them for the purpose of avoiding detection, prosecution and punishment by the authorities of the State of Georgia for the State charge of operating, or assisting in the operation of, a lottery. The Government contends that the petitioners concealed their activity in order to avoid "detection by persons other than the local police." (p. 13, brief of U.S.) The Court of Appeals ruled that "the jury could have found and apparently did find that the appellants were engaged in the mutual activity of operating a lottery with a common purpose of escaping detection; prosecution and punishment."

No contention is made by the Government, and no evidence was offered to prove, that any effort was made by any of the petitioners to conceal assets. No evidence was offered by the Government disclosing any agreement

between the petitioners to evade and defeat the payment of the federal taxes. No evidence was offered by the Government to prove that those petitioners not liable for the payment of such federal taxes had knowledge that the "banker" had not paid them.

"Pick-up men," messengers or "headquarters" personnel are exempted by law from the tax provisions of the Federal Wagering Tax Act.

United States v. Calamero, 354 U.S. 351.

Obviously the petitioners who come within the category just stated were not engaged in an *unlawful* act under federal law, and as to petitioner Ingram, the banker, the operation of the lottery by him was lawful under federal law although subject to the payment of occupation and excise tax.

The Government apparently concedes and the United States Court of Appeals for the Fifth Circuit tacitly held the concealment of the lottery operation by the various defendants was all the evidence the jury had to consider to authorize an inference that the defendants had conspired to evade and defeat the payment of the federal tax. This trial lasted 19 days, and the transcript consumes more than 3300 pages, yet only a few minutes were spent by the Government in proving the most vital issue of all, that the federal tax had not been paid. The Government never did show that any of the defendants were liable for the tax except petitioner Ingram.

In the case at bar the petitioners are all concededly guilty of violating the laws of Georgia pertaining to the operation of a lottery, a misdemeanor, as provided by

Georgia Code of 1933, Title 26-6502,

whereas the operation of a lottery is not a crime under federal law, but the taxing

"statute was passed, and its constitutionality was upheld, as a revenue measure."

United States v. Calamero, 77 S. Ct. 1138, (354 U.S. 351)

The federal courts must approach this case on the premise that persons engaged in the operation of a lottery in any capacity are violating no federal law in so doing. Those persons who do choose to engage in such occupation, however, are faced with the danger of punishment by the local authorities if detected and prosecuted. Insofar as federal authorities are concerned the bankers of the lottery need only pay the tax imposed upon them by Congress to stay within the federal law. As to the employees of the banker, they owe no federal tax, and they can not be held accountable for the failure of their employer to pay the tax which he may owe. It is only in those instances where such employees assist the banker or conspire with him *to evade the payment* of such federal tax that they violate any federal law.

The Court recognized in

United States v. Kahriger, 345 U.S. 22, (73 S. Ct. 510),

by a close majority, that the Wagering Tax Act did not offend the Constitution even though gambling in most States was recognized to be illegal.

Conceding the operation of a lottery, or the aiding and abetting of one, to be in violation of the criminal laws of the State of Georgia, as defined by Georgia Code 26-6502, concealment of lottery activities by those engaged in such unlawful pursuit, either in pursuance of a conspiracy under State law to operate, or individually, is a necessary and an essential precaution to the successful existence of the State violation whether the federal

tax imposed on such wagers be actually paid or not. Therefore concealment of the State lottery violation would not be relevant to prove knowledge of the failure to pay the tax inasmuch as the payment of the tax would not have eliminated concealment as a necessary factor to successfully avoid detection, prosecution and punishment for violating the State law.

The relevant question, therefore, is what logical inferences may be legitimately drawn from such evidence of concealment. Is it reasonable or logical that evidence of concealment of lottery activity authorizes an inference of participation in the operation of the lottery itself, which participation would subject the party concealing to arrest, prosecution and punishment by local authorities, or may evidence of such concealment authorize the inference that the party concealing *knew that the tax*, owed by another person, *had not been paid?* Such latter inferences, if they could be said to exist, would be objectionable on another ground, to-wit: that the hypothesis, being circumstantial, would be insufficient to exclude every other reasonable hypothesis, that is to say, that concealment was for the purpose of evading detection, prosecution and punishment by the local authorities.

Concealment of crime, along with evidence of flight, escape or resistance, is admissible as "indicative of a consciousness of guilt."

Wigmore on Evidence, 3rd Ed. #276.

So, concealment of lottery activity may authorize an inference of guilt; but the only guilt inferred would be that of the offense of operating the lottery and not that of the evasion of a tax imposed upon another person.

The evidence in this case clearly shows that the operation of the lottery required concert of action, and the

actions of the various agents, such as pick-up men and headquarters employees, under the Calamero case, supra, were lawful and would have demanded their acquittal on a substantive misdemeanor charge. Whether the tax had or had not been paid by their principal would not have caused them to do other than what they did, to-wit: *conceal their lottery activity*. Therefore, their acts of concealment fail to illustrate their knowledge or agreement to evade the payment of the tax.

PART II.

SPIES CASE NOT IN POINT

The United States Court of Appeals for the Fifth Circuit, in finding the evidence of concealment sufficient to authorize an adjudication that petitioners had conspired to evade and defeat the payment of federal wagering taxes owed by the banker, Ingram, relied heavily upon the case of

Spies v. United States, 317 U.S. 492;

on the theory that the *motive* for concealment was a question to be determined by the jury. This was erroneous.

The Spies case, supra, was a prosecution for the substantive offense of attempting to evade and defeat the payment of income tax. Spies admitted at the opening of his trial that he had sufficient income to place him under a duty to file a return and to pay a tax but that he did neither. The entire trial was devoted mainly toward the government's attempt to prove that Spies offense was that of the felony of attempting to willfully evade and defeat the payment of the tax. Evidence of concealment on the part of Spies was offered by the government to

raise the *admitted misdemeanor* of failing to pay the tax to the felony of evading and defeating its payment. On that point, this Court held:

> "If the tax evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

The Spies case is clearly distinguishable from the case at bar. Spies was a substantive charge; Ingram is a conspiracy. Spies admitted sufficient facts to authorize his conviction for the misdemeanor; the petitioners in the Ingram case are admittedly not guilty of any federal misdemeanor, substantive or otherwise. In Spies the concealment consisted of items directly relating to records dealing with income; in Ingram the concealment was of items connected altogether with the lottery venture. In Spies the evidence of concealment was circumstantial proof of the fact of evasion of the substantive offense; in Ingram the evidence of concealment fails to prove the conspiracy charged in the indictment.

PART III.

CONVICTION FOR CONSPIRACY UNWARRANTED WHERE NO INGREDIENT IN ADDITION TO THE WAGERING CONTRACT INVOLVED

This gist of the conspiracy in this case is the agreement to violate the Wagering Tax Act. In order to fasten liability upon any person for this tax a wagering agreement must be entered into between a bettor and a banker. The Act contemplates more than one person be involved. However, Congress has seen fit to impose no tax liability upon any person in this enterprise other

than the banker and a writer employed by him. The bettor or player, the pickup man and the other various and sundry employees of the banker or writer are all exempted, by the Act of Congress, from paying tax. In such cases as these, there can be no conviction for a conspiracy merely to enter into an agreement to operate a lottery unless there is another ingredient in addition to the wagering contract, for the criminality of the operation of a lottery in such case must stand or fall on whether the law imposes a penalty for such substantive act. In other words a conspiracy case can not be made out against one who could receive no penalty for the substantive offense, unless an additional ingredient is also present.

It must be borne in mind that a distinction must be made between crimes that may be committed by an individual singly, and crimes which, by their very nature, require concert of action or concurrence between two or more persons. Crimes such as manufacturing liquor, murder, arson, burglary, rape, larcency, or transportation of stolen vehicles in interstate commerce come within the former category, while offenses such as adultery, fornication, transportation of a female in interstate commerce for purposes of prostitution (with the female's consent), or selling liquor are all offenses necessarily falling within the latter category. This is necessarily true because where concert is necessary to accomplish a substantive offense, conspiracy does not lie without an additional ingredient.

U.S. v. Sager, 49 Fed. 2nd, 725.

The conspiracy is the unlawful agreement "to commit any offense against the United States,"

18 U.S.C.A. #371,

therefore where the substantive offense, the commission of which is the object of the conspiracy, is such type of offense that necessarily requires concert of action, or an unlawful agreement itself, the conspiratorial agreement is a necessary part of, and must of necessity merge in, the substantive offense.

United States v. Katz, 271 U.S. 354,
(46 S. Ct. 513).

Where Congress manifests an intention to leave certain persons unpunished, even though necessary parties to the commission of an offense itself, or to exempt certain individuals from the tax provisions of its laws, this must be taken to be

"evidence of an affirmative legislative policy,"
Gebardi v. United States, 287 U.S. 112,
(53 S. Ct. 35),

that they be not prosecuted for conspiring to violate such substantive offense.

The Gebardi case, supra, holds that on a charge of conspiring to violate the Mann Act the woman transported can not be convicted of the substantive offense and, therefore, can not be lawfully convicted of the conspiracy to transport herself. This Court held:

> "We perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished. We think it a necessary implication of that policy that when the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as an inseparable incident of all cases in which the

> woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter. It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers."

15 Corpus Juris Secundum, 1073, states the rule as follows:

> "An agreement to commit a crime is not indictable as a conspiracy where a concert and plurality of agents are necessary elements of the substantive offense for the commission of which a conspiracy is alleged to have been formed."

The case at bar falls within the same rules. The operation of a lottery necessarily requires the concert of many players and a banker, and the concurrence of many agents as pickup men or headquarters personnel. Congress has not seen fit to impose any penalty upon those persons who are not bankers nor writers, nor has Congress any desire to impose upon them a tax for carrying on such pursuit. Therefore, it would contravene such legislative policy to hold that the passage of the Wagering Tax Act "effected a withdrawal by the conspiracy statute of that immunity which the (Wagering Tax Act) itself confers." Gebardi v. U.S., supra.

The Wagering Tax Act, (26 U.S.C.A. #4401) imposes an excise tax of 10% on wagers. This tax is payable by the proprietor, sometimes called the "banker," of the wagering enterprise. The Act (26 U.S.C.A. #4411) also imposes a special tax of $50.00 per year to be paid by each person who is liable for tax under section 4401 "or who is engaged in receiving wagers for or on behalf of any person so liable." No penalty is imposed by the Act of Congress for *operating* the lottery. The only penalty

provided by the Act is set forth in 26 U.S.C.A. #7203. This section makes it a misdemeanor to willfully fail to pay such tax or file a return. The Act is strictly a revenue measure.

United States v. Kahriger, supra.

Those persons employed in any capacity other than as a banker or writer are not required to pay the taxes imposed by the chapter.

United States v. Calamero, supra.

It must be presumed that Congress, in enacting this legislation, intended to impose no tax upon those other than the bankers or writers, and that the misdemeanor provisions of the Act applied only to such persons required to file the return or to those who are liable for the payment of the taxes.

The agreement to receive a wager is an element which must of necessity be present to the existence of the fundamental basis of tax liability under the Wagering Tax Act. Agents and employees of the proprietor or "banker" are also essential to the pursuit of the occupation which becomes the foundation of the power of the government to tax. Congress has, therefore, in failing to impose a tax on the employee, impliedly excluded him from tax liability and has granted him immunity from the misdemeanor provisions of the Act for failing to pay the tax or failing to file a return.

The Government now seeks to use this same wagering contract, (to which Congress has seen fit to impose no tax liability), as a basis of a conviction under the conspiracy statute.

Can the Government argue with any logical force that the same wagering contract that is deemed by Congress

to be lawful in its substantive application can be the sole basis and foundation of a conviction when viewed from its conspiratorial aspect? Can that agreement to which Congress has given its stamp of approval when clothed in a substantive charge be held unlawful when wearing the garment of a conspiracy indictment? The answer must be in the negative.

Concert of action between the banker and bettors and a plurality of agents to carry out the operation are all indispensable elements of the substantive offense.

See: United States v. Dietrich, (126 Fed. 664.)

The misdemeanor offense of failing to pay the special occupational or excise tax or the felony offense of attempting to evade and defeat payment of the tax may only be committed by the principal banker, and the misdemeanor offense of failing to pay the special occupational tax or the felony of attempting to evade and defeat payment thereof may only be committed by the writer. However, his or their liability respectively must rest upon the pre-existence of a lottery or other wagering scheme or device. Such wagering device is a prerequisite to the tax liability and therefore an essential element of the offense charged. Since such lottery device requires concert of action by all its agents, there can be no conviction for conspiracy to commit the offense of failing to pay the tax or evasion unless the proof shows some ingredient in addition to the wagering scheme by which all the agents necessarily concur.

See; United States v. Burke, 221 Fed. 1014;

Vannatta v. United States, 289 Fed. 424;

Chadwick v. United States, 141 Fed. 225.

PART IV.

NO EVIDENCE THAT CONCEALMENT WAS TO ESCAPE DETECTION, PROSECUTION AND PUNISHMENT BY FEDERAL AUTHORITIES

The United States Court of Appeals for the Fifth Circuit's ruling that petitioners operated a lottery "with a common purpose of escaping detection, prosecution and punishment," and the Government's argument that the employee's concealment was for the purpose of avoiding "detection by persons other than the local police," are unfounded in both reason and logic.

Inasmuch as the employees of a lottery operation, who are neither bankers nor writers, are not subject to payment of either excise or occupational tax, they would not be subject to prosecution and punishment by federal authorities for engaging in such occupation in that respective capacity although they conducted themselves in an open and notorious manner; consequently no valid reason would appear for them to conceal such lottery activities from federal authorities in order to "avoid detection, prosecution and punishment." Why should they seek to *"avoid detection"* by a Government whose laws have not been violated by them or whose taxing power does not embrace them? Why should they conceal their activity from a Government to avoid *"prosecution,"* when that Government's laws do not prohibit the activity being concealed? Why should they hide from a Government in order to escape *"punishment,"* when that Government is without lawfully constituted power to inflict punishment on those not found violating its laws? How could it be logically held their concealment was for any purpose of avoiding detection, prosecution, or punish-

ment by persons other than the local police? That their concealment was for the purpose of "avoiding detection, prosecution and punishment" is readily admitted by the petitioners; detection, prosecution and punishment by the local authorities, however, and not the federal government. These employees had nothing to fear from the federal authorities; they owed no tax. They did have something to fear from the local authorities; detection, prosecution and punishment for violating Georgia Code 26-6502 relating to the operation of a lottery, or the aiding and abetting thereof.

Had the tax due the United States been paid or had the Wagering Tax Act been repealed would the concealment of the lottery operations have been any the less necessary, or would the same concealment have been an unnecessary factor prior to the enactment of the Wagering Tax Act of 1951? The answer must emphatically be *NO*. Therefore concealment to avoid detection, prosecution and punishment is not an element of any conspiracy to evade payment, nor is it a circumstance sufficient to authorize a conviction of the crime of conspiring to defraud the Government.

The Government's contention here is almost identical with its position in

Krulewitch v. United States, 336 U.S. 440,
(69 S. Ct. 716,)
Lutwak v. United States, 344 U.S. 604,
(73 S. Ct. 481,)
and
Grunewald v. United States, 353 U.S. 391,
(77 S. Ct. 963,)

where it was urged that

> "Conspirators about to commit crimes always expressly or implicitly agree to collaborate with each

other to conceal facts in order to prevent detection, conviction and punishment."

This Court rejected the Government's contention in all those cases by holding in Krulewitch, supra, and Lutwak, supra, that the declaration of a conspirator made after the central aim of the alleged conspiracy had ended was inadmissible and hearsay because not made in furtherance of the alleged criminal transportation conspiracy charged,

> "but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment,"

and by holding in Grunewald, supra, that prosecution was barred by the statute of limitations and that evidence of concealment long after the original conspiracy had ended would not be admissible to keep the original conspiracy alive. It was there held:

> "A subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment."

PART V.

CONCEALMENT NOT SHOWN TO HAVE BEEN ONE OF THE OBJECTS OF THE ORIGINAL CONSPIRACY

The doctrine of Krulewitch, supra, and Grunewald, supra, is that the law recognizes two different types of conspiracies. The first can be termed the main conspiracy; the second can be termed a subsidiary conspiracy. A conspiracy to conceal can belong to either group. If the object of the main conspiracy, that is to say the commission of the unlawful act itself, embraces

concealment as a necessary element of the substantive offense itself, or as a necessary ingredient thereof, then those acts of concealment can be said to relate to, and be objects of, the main conspiracy. However, if the acts of concealment, or the conspiracy to conceal, have for their object the purpose of avoiding detection or covering up the main conspiracy or the offense which was the object thereof, then such acts of concealment, or the conspiracy to commit them, constitute no more than a *subsidiary* conspiracy to conceal.

These rules should logically follow as an extension of Krulewitch, supra, and Grunewald, supra, without respect to the element of time. Such extension would tend to restrict the ever broad sweeping scope of federal conspiracy prosecutions by confining the prosecution to overt acts tending to prove the main conspiracy itself, rather than to permit it to roam into prejudicial and subsidiary conspiracies so remote to the main conspiracy as to create confusion and prejudice the rights of the defendants on trial as was done in the case at bar.

For example, a conspiracy to steal may embrace within its scope a conspiracy to conceal the article stolen by changing its appearance in order that the true owner might be more effectively deprived of its possession. Such a conspiracy to conceal could be termed a part of the main conspiracy because it has, as its object, one of the elements of the substantive offense itself. On the other hand, a conspiracy to steal may also embrace within its scope a conspiracy whereby the conspirators may avoid detection, prosecution and punishment. Such would be termed subsidiary because implied inherently in every conspiracy. Such subsidiary conspiracy to conceal is inherent in any conspiracy, whether expressed

or implied. However, the proof of such subsidiary conspiracy to conceal certainly should not be held to be sufficient in itself to authorize a conviction for the main conspiracy when the evidence fails to support the proof of such main conspiracy.

In Grunewald, supra, the government argued the analogy in the crime of kidnapping. The government contended that acts of conspirators in hiding while waiting for ransom would be planned acts of concealment in aid of such conspiracy to kidnap. This Court, in holding the analogy to be invalid, ruled:

> "Kidnappers in hiding, waiting for ransom, commit acts of concealment in furtherance of the objectives of the conspiracy itself, just as repainting a stolen car would be in furtherance of a conspiracy to steal; in both cases the successful accomplishment of the crime necessitates concealment. More closely analogous to our case would be conspiring kidnappers who cover their traces after the main conspiracy is finally ended—i.e., after they have abandoned the kidnapped person and then take care to escape detection. In the latter case, as here, the acts of covering up can by themselves indicate nothing more than that the conspirators do not wish to be apprehended – a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord."

The crucial teaching of Grunewald, Krulewitch and Lutwak, supra, is that acts of concealment for the purpose of avoiding detection, prosecution and punishment are inherent in every conspiracy and therefore not sufficient to breathe life into a conspiracy which has lived and died, nor keep a conspiracy alive after it has run its course of time. In those cases the Government proved

the existence of the main conspiracy, the only purpose of proving the acts of concealment being to extend the crime for an indefinite time past the ordinary statute of limitation. This, the Court said, could not be done.

If, in those cases, evidence of concealment was not relevant to keep life in a dying conspiracy, or to give life back to one that had previously lived, then it cannot give birth to one that never existed.

If proof of concealment in the case at bar is sufficient to prove the main conspiracy charged, then evidence of concealment in the Grunewald, Krulewitch and Lutwak cases, supra, would have been admissible to extend the life of one that was dead. The one must follow the other, as the night the day.

PART VI.

COURT OF APPEALS ERRED IN HOLDING THAT GOVERNMENT NOT REQUIRED TO PROVE FEDERAL TAX NOT PAID AND THAT OPERATION OF LOTTERY IS VIOLATION OF FEDERAL LAW

The United States Court of Appeals for the Fifth Circuit's opinion in this case affirming the District Court is inconsistent and ambiguous. In the first portion of the opinion, on the question as to whether the evidence was sufficient to show the appellants had knowledge of the banker's failure to pay the tax, the Court held:

> "With a factual situation such as the evidence here discloses, it will not be presumed nor was the Government required to prove that the tax which was payable had not been paid."

The Court of Appeals here ruled in effect that questions as to the payment or non-payment of the federal tax was not involved, but that the all-important fact of conspiracy

was to be determined from the evidence that the appellants had banded together for the purpose of operating a lottery and that concealment of their activity authorized the inference of a federal conspiracy to evade and defeat the payment of federal tax, and that whether the substantive violation of the failure to pay the tax was later accomplished or not was not to be considered as material to the fact of the conspiracy to effect such an object.

The Court of Appeals then completely reversed its position on the question whether a conspiracy can exist against one who could receive no penalty for the substantive offense unless an additional ingredient is present. The Court of Appeals, on this point, held:

> "If this were a case where one who had purchased a lottery ticket was contending that he could not be convicted of being a conspirator the argument might be persuasive. It is not such a case. The charge is not that of carrying on a lottery. It is of a conspiracy to evade and defeat the payment of the wagering tax."

Thus the first portion of the opinion recognizes the operation of the lottery and its concealment as the all-important criteria necessary to determine guilt, whereas the last portion of the opinion places the charge of carrying on a lottery as immaterial and recognizes for the first time that the real question at issue was the conspiracy to evade and defeat the payment of the wagering tax.

In

United States v. Biggs, 211 U.S. 507,
(29 S. Ct. 181,)

this Court held on the construction of a conspiracy indictment:

> "Having thus decided that the indictment as construed charged the doing of no unlawful act, but simply the exercise of lawful act, not in any way prohibited, but, on the contrary, impliedly sanctioned by the statute, it was decided that, under no possible construction, could the acts charged constitute an unlawful conspiracy * * * "

This rule is applicable in the case at bar. The evidence shows the commission of no unlawful act insofar as it concerns the federal government, but "simply the exercise of a lawful act, not in any way prohibited, but, on the contrary, impliedly sanctioned by the statute." Consequently "under no possible construction, could the acts charged constitute an unlawful conspiracy."

CONCLUSION

The concealment of lottery activity by the petitioners was necessary to avoid detection by the authorities of the State, and it was not shown that it was for the purpose of evading the payment of any federal tax. The evidence on behalf of the government failed to show knowledge by any of the petitioners that persons liable to the government for the payment of tax had failed to pay the tax or make a return. The concealment was not shown by the government to have been one of the objects of the original conspiracy. The conviction was unwarranted because the government failed to prove an ingredient in addition to the wagering contract involved.

The trial court erred in refusing to grant judgments of acquittal, and the United States Court of Appeals erred in affirming the trial court in such ruling. The judgment of the United States Court of Appeals for the

Fifth Circuit should be reversed, and the trial court ordered to enter judgments of acquittal.

Respectfully submitted,

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No. 457

In the Supreme Court of the United States

OCTOBER TERM, 1958

HORACE INGRAM, L. E. SMITH, MARY PARKS LAW AND RUFUS JENKINS, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 3379-3386; Pet. 17-24) is reported at 259 F. 2d 886.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1958 (R. 3387; Pet. 16). A petition for rehearing was denied on September 23, 1958 (R. 3392). The petition for a writ of certiorari was filed on October 20, 1958, and was granted on December 8, 1958. 358 U.S. 905. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether persons participating in a lottery operation, who were not themselves liable to pay the federal wagering taxes, were properly found guilty, upon the evidence presented, of conspiring with the proprietors of the enterprise to evade and defeat payment of the taxes.

STATUTES INVOLVED

The pertinent statutory provisions are set out in the Appendix, *infra*, pp. 50-56.

STATEMENT

Petitioners and others were charged in count 1 of an indictment returned on May 27, 1957 in the United States District Court for the Northern District of Georgia (R. 1-13) with a conspiracy to evade and defeat the payment of the wagering taxes on lottery "numbers" operations, imposed by 26 U.S.C. (Supp. V) 4401 and 4411, in violation of 18 U.S.C. 371 (*infra*, pp. 50, 51).

In counts 2 and 3 (R. 14-15), petitioners and 14 of the other defendants were charged with the substantive offenses, respectively, of accepting wagers without paying the special tax imposed by 26 U.S.C. (Supp. V) 4411, in violation of 26 U.S.C. (Supp. V) 7203 (*infra*, pp. 51, 55), and engaging in the business of accepting wagers without registering as required by 26 U.S.C. (Supp. V) 4412, in violation of 26 U.S.C. (Supp. V) 7272 (*infra*, pp. 52, 55-56).[1]

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[1] The cases of only 21 defendants were submitted to the jury, since Sanchez McDowell remained a fugitive, John Ingram, Charles Echols, and Hill Tallant were granted a severance, Clarence Walker was dismissed from the indictment on motion of the government at the commencement of the trial (Pet. Br. 11-12),

Petitioners Ingram and Jenkins were found guilty under all three counts (R. 3350, 3354). Petitioners Smith and Law, together with defendants Christian, Thomas, Turner, Robert Lee Lewis, Sr., Robert Lee Lewis, Jr., and John Hill, Jr., were found guilty under the conspiracy count (R. 3351-3353, 3355-3357, 3380; Br. Appellants below, p. 5).

Petitioners Ingram and Jenkins were sentenced to imprisonment for five years under the conspiracy count and one year on count 2, to be served consecutively, and a fine of $25 on count 3 (R. 3358, 3362). Petitioners Smith and Law were sentenced to imprisonment for three years (R. 3360-3361).

Upon appeal by petitioners and Christian, Turner, Lewis, Sr., and Hill, the convictions were affirmed (R. 3387; Pet. 16).

A. THE EVIDENCE

1. *The general nature of lottery operations*

A special agent of the Internal Revenue Service testified as to the general nature of the "numbers" operations as practiced in Atlanta (R. 27, 50 *ff.*).

The winning number was derived from the daily totals of bond and stock sales on the New York Stock Exchange appearing in the Atlanta press (R. 50-52). Accordingly, wagers were closed each day in ample time in advance of the publication to prevent a numbers player or member of the lottery organization from slipping a known winning number into the wagers (R. 53). At this fixed time the lottery tickets for each

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J. W. Ellington was granted a judgment of acquittal (R. 3289), and, upon motion of the government, judgment of acquittal was entered as to Hollis, Dickey, Freeman, and Williams (R. 2579).

particular day would be started on their way to a check-up headquarters (R. 63).

During the summer months the picking up of tickets in Atlanta began shortly after noontime due to the relationship of Atlanta time to New York time[2] (R. 54, 620). After the appearance of the winning number in the press, there were computed, at the check-up headquarters, the adding machine tapes showing money due from the respective writers to intermediaries (lottery "ribbons", R. 63), and tallies ("collection sheets", R. 64) showing total moneys due from the respective intermediaries to the bankers or "company".

The banker or "company" could be a partnership as well as an individual, under the Atlanta practice (R. 364).

The ribbons were sent back to the intermediaries for collection from the writers, usually reaching the city between 5 to 7 p.m. (R. 64-65, 67), and the collection sheets were sent to control headquarters (R. 66). The ribbons and collections were later taken, daily or weekly, to control headquarters for settlement (R. 65-67).[3]

Two different focal points of activity were involved in this type of operation—the checkup headquarters and the control or payment headquarters. The check-up headquarters would be located at points outside Atlanta and changed from time to time for purposes of concealment (R. 61-63), while the fixed control or

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[2] Atlanta was on Eastern Standard Time, and New York on Eastern Daylight Saving Time.

[3] The tickets themselves were kept at the outlying check-up headquarters about 24 hours to provide against possible "overlooks" of winning numbers and subsequent claims (R. 68, 122-123).

payment headquarters was within the city, where the actual money could be brought in promptly and conveniently (R. 65-66). The workers at checkup points were not only clerical employees but sometimes included persons in charge, sharing profits ("[o]ften times it is the banker himself"). Their responsibility was substantial since a person working there might slip in a ticket for a winning number (R. 366).

In Atlanta lottery jargon, a "pick-up man" was not a mere messenger as in *United States* v. *Calamaro*, 354 U.S. 351, 353. "Pick-up man" was used to denote one who made collections of money and usually wrote tickets himself (R. 59, 305, 372, 373). These pickup men employed or supervised "writers" who either worked for one pickup man or drifted from one pick-up man to another (R. 52, 54-56, 58-59). A "ribbon man" was a pickup man having a following of writers of his own (R. 367-371).

The mere messenger, known as a pickup man in *Calamaro, supra,* was, in the Atlanta nomenclature, a "drag man" or "sack man" (R. 61-63, 367, 373, 516) or a pickup "boy" (R. 2247; cf. R. 2287, 2294). The "jump boy" was one who rode along to run away from the car with the lottery paraphernalia in the event of apprehension, the officers thereby being divided in pursuit; also, the jump boy commonly went into a place to make a pickup (R. 283-284, 992-994).

2. *Petitioners' activities from 1954 to early 1957.*

During the period from the spring of 1954 until after a raid upon a group of the defendants at the Ingram garage on March 27, 1957, the activities of the defendants were under the surveillance of Special Agents of

the Internal Revenue Service, investigators for the Solicitor of the Criminal Court of Fulton County, Georgia, and a reporter for an Atlanta newspaper, and were observed by various private citizens. The surveillance was necessarily intermittent, being interrupted by other assignments of the officers and by the difficulties of trailing defendants in their numerous switchings of cars without alerting them to the surveillance, but certain actions and associations of persons were observed repeatedly and consistently.

On August 3, 1954, federal and local investigators commenced noncontinuous surveillance of petitioner Ingram's garage, in Atlanta, and from August 10 through August 26, 1954, maintained almost constant surveillance. Between 11 a.m. and 1:30 p.m., an average of 30 automobiles would come in and out during the day. Petitioners Ingram and Smith and, on one or perhaps two occasions, petitioner Law and defendant Ruby Ingram were seen there (R. 2542-2543).

From May or June 1954 until December 1954, defendant Clarence Walker, who testified as a government witness, was employed by petitioner Ingram as a drag man. Each day, commencing at about noon, he would pick up, in Atlanta, about 75 to 80 sacks of about the size of those later seized in petitioner Ingram's garage (*infra*, p. 15) and would take them to some point outside the city designated by Ingram each morning. He would deliver the sacks to petitioners Ingram and Smith at the designated point[4] and return on the same day for "ribbons" in equal number, which he would deliver in the city to defendant McDowell or place under a rock near a house. Ingram furnished the car some-

[4] Sometimes, there were "other people" with the two (R. 1798).

times used in Walker's activity and McDowell brought a pickup truck on other days; Ingram paid for the gas and oil. Walker saw police at Ingram's garage almost every day, and once, in Walker's presence, Ingram handed money to a police officer. Ingram told Walker that a payment he made to an officer was to prevent his "worrying" Ingram (R. 1789-1834). On December 16, 1954, Walker and McDowell were arrested in a green International pickup truck in possession of a substantial amount of lottery tickets (R. 1796-1797, 1801). Ingram paid for Walker's bond (R. 1797).

A long series of noontime and afternoon surveillances from the fall of 1954 into May of 1957 repeatedly disclosed petitioners Ingram, Smith and Law, and defendants Eugene Thomas and Ruby Ingram meeting at about noon and driving into the outskirts of Atlanta. Sometimes the occupants of the car could not all be identified and all five of the named persons were not detected upon all occasions. At times, an additional person might be in the car. Due to the need of keeping the surveillance undetected and the circuitous and evasive driving and switching of cars by the defendants, the officers were not successful in trailing the defendants to a final destination or in detecting their return route in the late afternoon (R. 212-217, 219-224, 228-229, 234-237, 253, 307-308, 313, 315-316, 318, 323, 442, 448-449, 459-460, 482, 543-544, 743-750, 2545-2551, 2553, 2557, 2560-2563).

On the afternoon of September 20, 1956, a checkup headquarters was detected by local officers at defendant Echols' house on a dirt road three miles out in the country from Cummings, Georgia. Petitioners Smith and Law and defendants Eugene Thomas and John Elmer

Ingram were caught tabulating lottery tickets in a locked room, with the typical "checkup" headquarters equipment of three or four adding machines, three folding card tables, rubber bands, gem clips, and brown paper bags of tickets. (R. 1090-1105, 1114-1115, 1120-1143, 1167-1170).[5]

Co-conspirator Allen testified that for about six months in 1955 he worked for petitioner Ingram at $40 per week picking up lottery tickets and placing them in a "stash" (R. 2246-2249, 2259, 2270-2271). Sometimes, Allen would deliver lottery tickets to petitioners Ingram, Law and Smith outside the city. The meeting place would be changed each month (R. 2249-2250, 2256-2258). Allen and defendant Turner also went out practically every evening to bring lottery ribbons back to the city (R. 2251-2252, 2256).

In the fall of 1955, petitioner Ingram told two state investigators who had been watching his garage that there were others in the lottery business in Atlanta besides him, and asked why the officers did not "get off [his] back" and try to catch some "other" lottery men.

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[5] Although defendant Tallant, then Sheriff of Forsyth County, after the arrests of September 1956, was furnished the true names of Smith, Thomas, and John Ingram by another officer (Law gave the false name of Marie Ransome), four accusations in Superior Court of the county were in false names. The above four and defendant Echols pleaded guilty and were fined $200 each (R. 1094, 1099-1101, 1195-1199, 1201, 1206, 1222-1224). Smith, Law, Thomas and Ingram were thereafter observed in their resumed activities (citations in text *supra* from R. 234 to 323 and R. 2560-2563). The Oldsmobile car seized at the Echols house, registered in Smith's name, was allegedly sold in condemnation proceedings to a Carl Woods, apparently a fictitious name (R. 1194, 1207-1208, 1222-1225, R. 2365—U.S. Ex. 167, R. 2370, 2373). Smith later reported theft of the original tag for the car, and another tag was issued to him for it on October 11, 1956 (R. 2365—U.S. Ex. 168, R. 2370, 2373, 2378-2379).

Ingram stated that the investigators were not going to "catch [him] around any lottery"; that the investigators following his men had caused him to "change cars as many as five times in one day"; and that others were taking away his business, which had been reduced to $3,500 per day (R. 1024, 1027-1028, 1065-1066).

On December 1, 1955, defendant Turner was apprehended in the act of transporting 18 sacks of lottery tickets in a specially constructed compartment of a truck then painted red (R. 757-761, 764, 2320-2322). While this truck was stopped, petitioners Ingram and Smith drove by and were pursued, but not caught, by a police officer (R. 759-760, 2319-2320). Turner informed the investigator that petitioner Ingram would pay for his bond and fine for the lottery offense (R. 774, 776). On December 10, 1955, Turner pleaded guilty to a state charge of lottery (R. 1762). Petitioner Smith appeared at the courthouse at the time of Turner's plea, and Smith paid Turner's $1,000 fine and $100 attorney's fee (R. 1762-1764).

The truck used by Turner had been painted green when defendant McDowell, driving it, was stopped by an investigator on June 22, 1955 (R. 757, 776-777, 891). During 1955, for a time, this truck was painted a third color (black) and was regularly used by co-conspirator Allen and defendant Turner (R. 2254-2256, 2384). Petitioner Ingram paid for the servicing of this truck and of four or five cars specially adjusted for faster acceleration (R. 2380, 2383-2385, 2387-2389).

On December 24, 1955, police sergeant Slate told two police officers that petitioner Ingram said that they should come over to his garage to get a ham and a fifth of whiskey. Slate said that Ingram was "good to policemen", and that all the "Big Boys" were at Ingram's

garage, with "about forty-five down there today" and that Ingram had said to "take it easy on him, that we was hurting him" (R. 1865-1866, 2133-2135). Police officers carrying presents of ham and whiskey were seen leaving Ingram's garage in December 1955 (R. 1669-1670, 2265, 2289-2290). The record shows that petitioner Smith, under fictitious names, bought hundreds of pounds of ham and turkey for delivery at Ingram's garage (R. 2171-2175; U. S. Exs. 137, 138, 143-150).

In 1956, the investigating officers were able to obtain a witness who had placed bets. He testified that he had placed bets with defendant John Ingram for about four months in 1956, and that John Ingram later had asked him to plead the Fifth Amendment and not testify against him (R. 2230-2232).

In a conversation with an officer in the summer of 1956, petitioner Ingram disclosed the value of defendant Williams to him in his ability to "outrun any policeman" and in never dropping tickets (R. 2009, 2110, 2120-2122). He said that another operator was trying to syndicate the lottery and was getting Ingram's business (R. 2123-2124).[6]

In January and February, 1957, officers had under surveillance a house at 482 Sixth Street at which "almost a constant stream" of persons were observed entering and leaving (R. 238, 240-241) and from which there at one time emerged a man carrying a brown paper sack (R. 241). On January 21, at 10:40 a.m.

[6] In the fall of 1956, petitioner Ingram, angered by the fact that his son had been given a speeding ticket, offered to bet two police officers $1,000 that they would not remain on their beat after that week. Ingram stated, "I've got more power and more politics than either of you". A few days later the officers were transferred to a beat in a different part of the city (R. 1847-1849, 1851, 2006-2007).

petitioner Rufus Jenkins made a stop at the house but no lottery paraphernalia was found upon him (R. 250-251). On January 24, at 10:30 a.m., he was observed driving slowly past the house (R. 252), and was again observed driving past the house on February 7 and February 8 at about 11:00 a.m. (R. 290-291). On February 4, at 10:40 a.m., he drove up to the house, and he and two others left the car, but a man directed his attention to the watching officers up the street and he started to leave the area. His car was stopped by the officers. One of the accompanying boys started away from the car across a vacant field, and another jumped from the back seat and ran. Jenkins attempted to drive off. After a two-block chase the runner was caught, and Jenkins was brought back by another officer. No lottery paraphernalia was obtained (R. 257-259, 786-787). However, on February 27, Jenkins, in a conversation concerning the incident of February 4, admitted that when the boys had fled they had left the sack of lottery tickets on the seat beside him (R. 265, 282-286, 288, 787).

Defendants Robert Lewis, Sr. and Robert Lewis, Jr. were pursued on February 14, 1957 at 11:00 a.m. and Lewis, Jr. threw away lottery tickets during the chase, of which two were recovered by the officers. The tickets bore writers' identifications (3X and 360, respectively), like those on some tickets seized from Turner (R. 299-303, 305, 788-789; Turner's tickets were in U. S. Ex. 91, a sackful of bags of tickets, R. 761-762, 785).

3. *Surveillance and raid of Ingram's garage*

In the early part of 1957, surveillance was intensified at petitioner Ingram's garage, especially by means of observations from the window of a nearby house on

January 7, 9, 12, 16, February 1, 28, March 8, 13, 18, 25, 27, 1957, including moving pictures taken on several days (R. 726, 792, 1176-1177, 1318). The two doors leading into the office of the garage, which were generally closed, each had a window of mirrored one-way glass about a foot square, which permitted vision only from the inside, and were equipped with double locks. The remaining windows of the garage were frosted and high above the ground (R. 30-31, 659, 810, 1039-1042). During the surveillance, while there were repeatedly 25 to 30 cars at the garage coming in and out every few minutes (R. 1354-1356, 1592-1593, 1670-1671), scarcely any garage work was done on them (R. 618, 704, 713-714, 821, 1013, 1020, 1356, 1361, 1457-1458, 1465, 1486-1487, 1592-1593, 1670-1671). Petitioner Ingram was generally to be seen at the garage. He talked to a number of persons some of whom carried sacks. They "would go into the office and close the door" (R. 794-795). Ingram was observed arriving at the garage in different cars. Once, arriving with defendant Fain, Ingram was seen carrying four cloth money bags from the car into the office (R. 795-796, 1185-1186). On other occasions, arriving alone, he again carried cloth bags or the paper sacks (R. 796-798, 1181, 1186, 1318-1320). Bags or sacks were seen carried in and out of the garage in the special rolled, folded, manner used in lottery business (R. 880).

Petitioner Ingram was also observed, on one occasion, arriving at the garage with two stacks of currency a foot or more high (R. 1183-1184). He was observed on another occasion with Jenkins, each counting a very large roll of bills, an inch and a half thick (R. 1181, 1345). He was seen giving bills to

defendant McDowell (R. 798, 1321). On three occasions, petitioner Ingram was observed either handing money to a police officer or dropping money inside a police patrol car (R. 802, 804, 861-864, 1177-1178, 1322-1323, 1360, 1587-1590, 1688-1692, 1661-1663, 1704, 1708-1709).[7] At other times police cars were repeatedly observed at the garage, and petitioner Ingram was observed on occasion in conversation with the officers (R. 325-327, 356, 378, 381, 562-565, 568, 591-594, 598-599, 630-636, 682-683, 694, 732-733, 737, 799-802, 804-805, 807, 1180, 1182, 1186-1187, 1320, 1323-1324, 1326, 1327-1328, 1350-1351, 1465-1476, 1479-1482, 1594). At one time police were present when petitioner Ingram was there and Reid was taking a sack into the office (R. 1350-1351).

Petitioner Jenkins, during all of several witnesses' observations, was at petitioner Ingram's garage every day, going in and out several times per day (R. 297-298, 548, 735-737, 822, 1344-1345). He was repeatedly in the office behind closed doors with some of the others (R. 822-823). He was observed with petitioner Ingram, as noted above, each counting a "very large" roll of bills, an inch and a half thick (R. 1181, 1345). He was seen in conversation with petitioner Ingram (R. 1346). He used different cars, and he appeared and left with unidentified persons, and with defendant Hill (R. 823, 1346-1348).

Petitioner Smith was at the garage every one of

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[7] The witnesses did not know the identity of the police officers. Identification as defendants Bennett, Hicks, Carter, and Wade was indicated by police records (R. 2490-2497, 2504-2505, 2507-2514), but receipt of money was denied on the stand by the officers (R. 2862, 2865, 3037, 3066, 3127).

the observed days (R. 1591). He was seen entering the office with petitioner Ingram and others and staying there behind closed doors in the evening and carrying between the office and various cars heavy cloth sacks, bags, a box and, once, an adding machine (R. 737, 806-810, 1331-1332, 1334-1339). He was seen arriving or leaving with Christian (R. 808, 1331-1332, 1334) and Turner (R. 808, 1336). On one occasion he handed some bills to someone in a car (R. 1337). He switched cars on occasion (R. 1331-1332, 1334).

Defendant Christian opened the office of the garage each morning, generally bringing in a small sack (R. 733-734, 811-813, 1330, 1332). He was seen carrying boxes, a small paper bag, and a small cloth sack (R. 812, 1331-1333), and leaving, or returning with petitioner Smith (R. 1331). He was seen with the police (R. 733, 1326, 1331) and he was seen peeling bills off a roll and handing them to an unidentified man (R. 1330).

Also observed in and out of the garage during this period were Hill (R. 736-737, 827-829, 942, 1348), Lewis, Sr. (R. 824-825, 1351), Turner (R. 734, 736, 831, 980-981), Will Smith (R. 735-736, 818-819, 1352), Reid (R. 735, 941-942, 1326, 1348-1351, 1573-1578), Ruby Ingram (R. 1352-1353), and Fain (R. 734-736, 825-827, 1326, 1342-1343), as well as others not on trial, such as John Ingram, whose trial was severed (R. 734, 737, 829, 831-833, 1339-1341), McDowell, who was a fugitive at the time of the trial (R. 798, 808, 820-821, 1326, 1353), and Hollis (R. 733-735, 1354). Hill, on two observed occasions, was seen leaving in a great hurry with Ford who had a brown paper bag. He and others were at

times seen with cloth sacks (R. 828-829), boxes, and the bags (R. 826, 833, 941-942, 1339-1341). There was also in this group the characteristic switching of cars (R. 818-820, 828, 832, 1348-1352).

On March 27, 1957, at 7:00 p.m., a party of eleven federal agents and two county officers raided the garage under a federal search warrant (R. 184, 187). Petitioners Ingram and Smith and defendants Christian, McDowell, and Will Smith were present. Petitioner Jenkins arrived at about 8:45 p.m. (R. 185-186). A lottery ribbon was found on the floor between defendants Christian and Will Smith (R. 71-72, 2516-2518, 2520), part of another was found on petitioner Smith (R. 115-116, 121, 135), part of another in the cash register (R. 136-137, 143), and a slip of paper with the day's winning number on the desk (R. 108-109, 111-112). A banker's collection sheet was found on the desk (R. 114, 135). $8,934 in currency was found on defendant Christian (R. 146, 152) and $784.45 in currency and coin on petitioner Ingram (R. 144, 152). Also found were about 2,300 to 2,400 3 x 5" scratch pads of the type used in lottery operations (R. 55, 163-165), 300 to 400 size 20 brown paper sacks (R. 160-162), 200 to 300 No. 6 brown paper sacks of the type commonly used in lottery operations (R. 160-162), thousands of coin wrappers (R. 209-211), a large quantity of rubber bands and gem clips commonly used in lottery operations (R. 165-166, 174), three card tables (R. 172-173), a police-alarm radio, with secret code of police calls (R. 107, 155-160), two high-frequency radios (R. 166-168), and six fictitious automobile registrations, with license tags (R. 181-183, 1711-1714, 1717-1719, 1728-1730, 1751-1752, 1756, 2004, 2564-2566).

4. Subsequent activities

The raid of March 27, 1957 was followed by further activity. On the next day, March 28, shortly after noon, petitioner Law was picked up by defendant John Ingram, and, together with Thomas, attempted to evade some officers, without success (R. 2560-2563). On the following day, again shortly after noon, John Hill, Jr. was apprehended in a car with two other men. One jumped out and ran with a brown paper bag, which was recovered and disclosed lottery tickets bearing writers' symbols similar to those taken from Turner on December 1, 1955 (R. 2350-2353; U. S. Exs. 94, 164). In April and May 1957, petitioner Smith and defendant John Ingram, respectively, delivered cars registered in the names of Fain and Hollis to Minicy for painting (R. 2185-2187, 2196-2197, 2366 (U. S. Exs. 171, 174), 2373 (U. S. Ex. 174 admitted), 2375-2376). Ingram wanted the car painted that day. (R. 2187).

5. Non-payment of tax

The Internal Revenue records for the years 1954 through 1957, inclusive, showed that none of the defendants or co-conspirators had purchased a federal wagering stamp, registered with the Director of Internal Revenue as persons engaged in the wagering business, or paid a federal excise tax on wagers (R. 1991-1993, 2000-2003).

B. THE INSTRUCTIONS

In his charge, to which no exceptions were taken, the trial judge included the following instructions to the jury:

> * * * The concealment of a criminal or unlawful act must have been part of the agreement entered

into between the defendants for the purpose of evading the revenue laws of the United States. That is to say, the concealment must have been part of the agreement constituting the conspiracy, if there was one, that the operation of the alleged lottery would be concealed in order to accomplish the defeat of the payment of the tax, and not solely for the purpose of escaping an arrest for the violation of any other law, or for any other purpose [R. 3320-3321].

* * * * *

All persons engaged in the operation of a lottery are not liable to the wagering tax, under which the defendants have been indicted. * * * [T]he only persons thus engaged who are, under the law liable for the tax are the persons engaged in such lottery as writers, if there be any, and bankers, if there were any, or persons having a proprietary interest in such lottery operation, if there were any. The United States is not charging the defendants with the crime or misdemeanor of operating a lottery, and the jury will not concern itself as to whether or not there was a conspiracy to violate the laws of Georgia prohibiting the operation of a lottery, it being the province of the courts of this state, and its officers, to enforce that law and to prevent its violation. The violation of a law, if there has been one, in this case, and with which you are concerned, is the agreeing and conspiring among the defendants by affirmative, positive actions, to willfully and intentionally aid and assist any writer, if there was any, or any banker, if there was any, or any person having a proprietary interest in the op-

eration of the lottery, to violate the law by defeating or evading the tax [R. 3321-3322].

* * * The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement and participation therein with knowledge of the agreement [R. 3322-3323].

* * * * *

Now the mere presence of one at a place at which a crime is being committed is not a sufficient circumstance in itself to show that he is engaged in that unlawful act. That is true, even though it might be shown that he was at such place with the intention of committing some other crime or unlawful act, even though such other crime or unlawful act which he intended to or did commit, was in some way connected with the crime with which he is charged, but not an element of the same.

Now I also instruct you that the object of the conspiracy charged by the Government is that of defrauding the United States in attempting to evade and defeat certain taxes. I charge you that in order to find the defendants guilty of this conspiracy you must, beyond a reasonable doubt, find that there existed, as a part of the conspiracy, an intention on the part of the defendants charged, to defraud the United States [R. 3324].

* * * * *

* * * [E]ven though you find that one or more of the defendants engaged in the business of conducting a lottery, but that their dealings were

independent and separate transactions, carried on without any agreement or understanding with any of the other defendants or co-conspirators named in the indictment, they could not be found guilty of the conspiracy [R. 3325; again at R. 3343].

* * * * *

* * * The fact that a defendant or defendants had violated the State law by carrying on the business of a lottery described in the overt acts charged in the indictment would not necessarily make them guilty of the offense of conspiracy charged in the indictment, however serious the offense of conducting a lottery may have been under the State law, unless you find beyond a reasonable doubt that they entered into the conspiracy to defraud the United States of the taxes due, and to attempt to evade and defeat such taxes.

Now I charge you, Lady and Gentlemen of the Jury, that Section 7201 of Title 26, United States Code, making it a felony to attempt to evade or defeat a tax, is not violated by willful omissions to make a return or to pay the tax. In order to commit the offense of attempting to evade and defeat the taxes it is encumbent upon the Government to show some willful commission, in addition to the willful omission, which are defined to be misdemeanors.

Now I instruct you that where the evidence of the Government shows certain conduct on the part of the defendants, or any of them, in the handling of affairs, the likely effect of which would be to mislead or conceal, then it will be your duty to look to the evidence and determine the motive

for such conduct, and if you should find that the motive for such conduct was for the sole purpose of concealing a lottery operation, then such conduct would not amount to acts of commission to defeat or evade the tax; however, if the tax evasion motive plays any part in such conduct the offense may be made out even though the conduct may serve other purposes, such as the concealment of the lottery from State officers, if you find that a lottery was being conducted [R. 3326-3327; again at R. 3343-3345].

* * * The attempt must be willful, that is intentionally done with the intent that the Government should be defrauded of the tax due from the defendants.

Now the word "willful", as used in these statutes, means with knowledge of one's obligation to pay the tax due, and with intent to defraud the Government of that tax [R. 3327].

* * * * *

* * * [T]he evidence must disclose something further than participating in the offense which is the object of the conspiracy. There must be proof of the unlawful agreement, either express or implied, and participation with knowledge of the agreement. Mere knowledge of the conspiracy without participation therein would not be enough. The gist of the offense is the conspiracy, which is not to be confused with the acts done to effect the object of the conspiracy [R. 3331].

* * * * *

> * * * [T]he provisions which require the payment of the tax, the registering and reporting do not apply to pick-up men or other employees who are not actually engaged in receiving wagers and do not have any proprietary interest in the enterprise and act merely as messengers or perform clerical duties in the headquarters of such lottery operation, if you find that there is such a lottery operation [R. 3335-3336].

SUMMARY OF ARGUMENT

I

A. The jury was clearly instructed that it could convict the defendants only if it concluded from the evidence, beyond a reasonable doubt, that it was an objective of the conspiracy that the federal taxes be evaded. The trial judge told the jury that "[t]he United States is not charging the defendants with * * * operating a lottery," and that the violation, "if there has been one in this case," is the "conspiring" of the defendants "by affirmative, positive actions, to willfully and intentionally aid and assist" any writer, banker, or principal; "if there was any," to violate the law "by defeating or evading the tax."

The judge further specifically cautioned the jury that, where the evidence showed concealment, the jury must distinguish between "the sole purpose of concealing a lottery operation"—in which case the federal conspiracy offense would not be established—and "the tax evasion motive"—in which case the federal conspiracy offense could be made out even though the concealment may serve "other" purposes, such as "the concealment of the lottery from State officers."

The judge carefully distinguished evidence disclosing mere "participating" in the offense which is the object of the conspiracy, and stated that there must be proof of "the unlawful agreement, either express or implied, and participation with knowledge of the agreement." The defendants, represented by several attorneys, did not except to the instructions.

The jury found petitioners and six of the other defendents guilty of conspiracy and acquitted a number of others who either took the stand persuasively in their own behalf (petitioners did not testify) or lacked some of the more direct contact with the lottery tickets. The jury found two of the petitioners guilty, as well, of substantive offenses but acquitted the other two, doubtless upon the basis of instructions under *United States* v. *Calamaro*, 354 U.S. 351. It thus appears that a conscientious jury followed clear and correct instructions in weighing the evidence.

B. The evidence amply supports the jury's verdict. It has been well established by this Court that a conspiracy, essentially a matter of secrecy, need not be proved by producing an express agreement. The proof is properly made by the presentation of facts and actions from which there is to be inferred a meeting of minds in a common purpose. In reviewing the jury's verdict, moreover, it is not the province of an appellate body "to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government * * *." *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664 (cited in *Glasser* v. *United States*, 315 U.S. 60, 80). It is equally elementary and long established that a necessary consequence

or aspect of an enterprise can properly be inferred to be an objective, and attributed to the conspirators.

Here, both the petitioners' actions and the necessary inferences which they support demonstrate that the federal wagering taxes, with their accompaniment of local public registration and conspicuous posting of stamps at the place of business, had to be evaded. The taxes themselves would have taken 10% out of the gross. In addition, each banker and writer would have had to register at the local internal revenue office, which registration was specifically provided to be open to the public and available to local prosecutors. Books were subject to inspection, changes of location were to be reported, and it was required that wagering tax stamps be placed "conspicuously" in the places of business of the tax-payers.

The magnitude and organization of the enterprise precluded any conjecture that leading participants were not alert to the federal wagering tax legislation, and to the need of evading it in order to escape local law enforcement. For this was no small operation; it was a huge and well-defined enterprise. At one time it was estimated by petitioner Ingram as having been *reduced* to $3,500 per day.

The extensive evidence of concealment—false licensing and changing of colors of cars, evasive routings to the checkup headquarters, attempts to bribe officers, outright flight on occasion, the very structure of the city headquarters with its mirror-windows for one-way vision—all of this was proper evidence to show not mere omission but affirmative and deliberate conduct: it was properly considered as having that effect, under *Spies* v. *United States*, 317 U.S. 492, 499.

Nor was the evidence properly subject to petitioners' argument which seeks to approximate it to the situation in *Krulewitch* v. *United States*, 336 U.S. 440, *Lutwak* v. *United States*, 344 U.S. 604, and *Grunewald* v. *United States*, 353 U.S. 391, where evidence of concealment after the achievement of the objective was held not to show continuation of the former conspiracy; here, petitioners have presented no question in the Court of Appeals or before this Court as to the continuing nature of the conspiracy. Accordingly, the evidence of concealment properly shows the affirmative and willful actions of the conspirators to effect the objectives of the unlawful enterprise.

It need scarcely be labored that a conspiracy may have a number of objectives, some supplementary to others. The inference was proper and, indeed, unavoidable that if the objective of a continued livelihood from this lottery enterprise were to be achieved, there would have to be success in the objective of frustrating the local authorities—especially the county officers—and this objective would be disastrously imperiled if the federal taxes were not evaded along with their accompaniments of public local registration and "conspicuous" posting of the wagering stamps.

C. Petitioners contend that, as to those who were not themselves liable for the payment of the taxes, there was no reason to infer knowledge that the nonpayment was part of the scheme. It is to be noted, preliminarily, that this argument, even if valid, would be available only to petitioners Smith and Law; as to petitioners Ingram and Jenkins there was no challenge in the Court of Appeals as to the validity of their conviction under the substantive charges of omission

to pay the taxes and failure to register. As to Smith and Law, the argument consists largely of an emphasis on the narrow, and here irrelevant, point that these two were not the particular members of the enterprise required to make the actual payment of the taxes, and a persistent disregard of the massive evidence showing the importance of the part they did play in the enterprise.

The record discloses, as to petitioners Smith and Law, such long association and experience and such high responsibility in the activities of the organization as to compel the conclusion, implicit in the verdict of the jury, that they knew it was a necessary part of the conspiracy that the federal taxes be evaded. The magnitude and nature of the enterprise was such it would have been impossible without the precision timing, full understanding, and intelligent agreement of those within the inner circle. The jury was entitled to find, on the basis of extensive evidence, that Smith and Law were important personnel at the very nucleus of the operation—individuals far removed from the simple messenger status that was before this Court in *United States* v. *Calamaro*, 354 U.S. 351. As early as August 1954, petitioners Smith and Law were observed at the city headquarters at petitioner Ingram's garage, and at about that time Smith was already seen with Ingram at the critical and secret time and place of delivery of collected tickets by a "drag man". Later, both Smith and Law were seen with Ingram. In a long series of surveillances by federal and county officers, petitioners Smith and Law were observed as a regular part of the small group which gathered by separate routes to drive to the checkup headquarters,

petitioner Ingram and defendants Thomas and Ruby Ingram usually being the others. And when the check-up headquarters was at last discovered by the officers, both Smith and Law were present. They pleaded guilty to the state lottery offense under false names. Smith, in addition, constantly appeared in other activities. Notably, when defendant Turner was caught with the lottery tickets, it was Smith who appeared at the courthouse and paid Turner's fine of $1,000 and attorney's fee of $100. And when the officers raided the garage headquarters in March 1957, Smith was found to have part of a lottery ribbon—not merely a ticket—in his possession.

Since the record affirmatively shows that the taxes were not paid, it is likewise properly to be inferred that none of the conspirators saw any posted wagering stamps so as to lead them to believe that some one else was paying the taxes. Nor is there any affirmative testimony, as distinguished from present argument, to indicate that Smith and Law were unaware of the federal legislation, or to indicate any understanding that federal tax evasion was anything but an understood and agreed necessity of the unlawful enterprise.

II

Petitioners' repeated emphasis on the fact that Smith and Law were not the persons required to make the actual payment of the taxes seems to assume that persons who are incapable of committing a substantive offense cannot be guilty of conspiracy to commit that offense. That argument, it should be recalled, is totally inapplicable to petitioners Ingram and Jenkins,

who were found to be persons liable to payment of the taxes, and the argument misconceives—as to Smith and Law—the essence of the separate offense of conspiracy. The fact that one is not guilty of the substantive offense or even incapable of that offense has never been supposed to grant a license to conspire with others in the commission of the offense. *United States* v. *Holte*, 236 U.S. 140, 145. "[I]t is the collective planning of criminal conduct at which the statute aims. The plan is itself a wrong * * *". *Gebardi* v. *United States*, 287 U.S. 112, 121. Nothing in *United States* v. *Calamaro*, 354 U.S. 351, was remotely directed toward, or impliedly contrary to, this long established principle, nor has Congress chosen to engraft any such exception on the conspiracy statute.

Petitioners also contend that the substantive offense of evasion of federal wagering taxes and the conspiracy to commit the offense were here merged. The contention rests upon a misconception both of the offense and of the doctrine of merger. Agreement—other than that between the vendor and purchaser of a lottery ticket—is not intrinsically demanded in a lottery enterprise upon the part of those wagering; and evasion of the taxes can be effected without concerted action even though upon occasion, as here, an extensive conspiracy is more profitable.

If it were sought to charge a conspiracy between a buyer of a numbers ticket and a writer, perhaps there might arise a question of merger of the conspiracy in the agreement to buy, but that (as the court below observed) is not this case. A banker can deal directly with a bettor, but if he adds to this conduct the additional strength of an organization and the specializa-

tion and possibilities of concealment made possible by a conspiracy, the additional agreement is typically the danger and offense for which punishment for conspiracy is designed. Moreover, merger does not occur where parties are involved in the conspiracy other than those who committed the substantive offense. *United States* v. *Lutwak*, 195 F. 2d 748, 755-756 (C.A. 7), affirmed, 344 U.S. 604.

ARGUMENT

Petitioners do not question the sufficiency of the evidence—which was in fact overwhelming—to show that they engaged in a lottery enterprise and endeavored to conceal their operations. They do argue that the evidence does not show that it was part of this concerted scheme to evade the federal taxes with respect to wagering. But the federal tax, which had been in effect since 1951, was so potentially dangerous to petitioners' activities that the argument that they did not intend to evade the payment of such taxes assumes a degree of naïveté and ingenuousness contrary to human experience. Petitioners' legal position is, as we develop *infra*, as unsound in law as it is in fact.

The other facet of petitioners' argument is that those petitioners who were not themselves liable to post stamps and pay the tax could not be held liable for conspiracy to defeat the tax. It should be noted that petitioners' argument leaves out of the discussion Ingram and Jenkins who were central figures of the conspiracy, and who do not challenge their conviction on the substantive offense of failure to pay taxes and register. As to the other two petitioners, Smith and Law, we shall show that, although they may not have been quite principals of the lottery operation, they had a degree

of responsibility far beyond that involved in the simple position of messenger in which petitioners' argument tries to place them. The fact that they were not personally required to pay the tax does not render them immune from liability for the different offense of conspiracy to help evasion by those whom Congress has directed to pay taxes. It has never been the law that a conspirator's acts must qualify for guilt of the substantive offense to render him liable for conspiracy. It is often a common objective of a conspiracy to achieve unlawful results beyond those that might be within the province of some of the participants; but all participants are nevertheless liable for the offense of conspiracy when their activities are consciously in aid of the unlawful objective.

I

The Jury Was Clearly and Correctly Instructed, and Properly Found That Petitioners Intended to Evade Federal Taxes

A. THE JURY WAS INSTRUCTED THAT IT COULD CONVICT PETITIONERS OF CONSPIRACY ONLY UPON FINDING BEYOND A REASONABLE DOUBT THAT EVASION OF THE FEDERAL WAGERING TAXES WAS ONE OF THE OBJECTIVES OF THE CONSPIRACY

It is patent, upon this record, that the jury understood that it could convict petitioners under the conspiracy count only if it concluded from the evidence, beyond a reasonable doubt, that one of the objectives of the conspiracy was evasion of the federal wagering taxes. The instructions, repeated and emphatic, were models of clarity.

Of the instructions to the jury, set forth more fully in the Statement, *supra*, pp. 16-21, the following bear repetition:

* * * The United States is not charging the defendants with the crime or misdemeanor of operating a lottery, and the jury will not concern itself as to whether or not there was a conspiracy to violate the laws of Georgia prohibiting the operation of a lottery, it being the province of the courts of this state, and its officers, to enforce that law and to prevent its violation. The violation of a law, if there has been one, in this case, and with which you are concerned, is the agreeing and conspiring among the defendants by affirmative, positive actions, to willfully and intentionally aid and assist any writer, if there was any, or any banker, if there was any, or any person having a proprietary interest in the operation of the lottery, to violate the law by defeating or evading the tax [*supra*, pp. 17-18].

* * * * *

Now I instruct you that where the evidence of the Government shows certain conduct on the part of the defendants, or any of them, in the handling of affairs, the likely effect of which would be to mislead or conceal, then it will be your duty to look to the evidence and determine the motive for such conduct, and if you should find that the motive for such conduct was for the sole purpose of concealing a lottery operation, then such conduct would not amount to acts of commission to defeat or evade the tax; however, if the tax evasion motive plays any part in such conduct the offense may be made out even though the conduct may serve other purposes, such as the concealment of the lottery

> from State officers, if you find that a lottery was being conducted [*supra*, pp. 19-20].
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> * * * * *
>
> * * * [T]he evidence must disclose something further than participating in the offense which is the object of the conspiracy. There must be proof of the unlawful agreement, either express or implied, and participation with knowledge of the agreement. Mere knowledge of the conspiracy without participation therein would not be enough. The gist of the offense is the conspiracy, which is not to be confused with the acts done to effect the object of the conspiracy [*supra*, p. 20].

The petitioners, diligently represented by several attorneys (R. 25), did not except to these instructions.

It is thus clear that the jury had squarely before it petitioners' contention that the conspiracy somehow had excluded any evasion of the heavy federal taxes and of their accompanying requirements of registration and public posting of the wagering stamp in the place of business. The jury's verdict demonstrates that it found this highly implausible contention unpersuasive. And the jury was manifestly capable of observing careful distinctions for it returned no sweeping verdict of guilt of the whole array of defendants but convicted some and acquitted others upon discernable and supportable bases. For example, it found only the four petitioners and six other defendants guilty but did not find a verdict of guilt as to Reid, Ruby Ingram, Will Smith, Fain, or Ellington, or the police officers present at the garage, who respectively offered testimony in explanation of their conduct or who were never

clearly caught in actual contact with lottery tickets. It found the two central petitioners, Ingram and Jenkins, guilty on the substantive charges and the other petitioners guilty only of conspiracy. Its failure to acquit petitioners does not show lack of comprehension.[8]

B. THE EVIDENCE SUPPORTS THE FINDING THAT EVASION OF FEDERAL TAXES WAS AN OBJECTIVE OF THE CONSPIRACY

It hardly needs restatement that a conspiracy is rarely evidenced by a written contract agreeing in full detail to the commission of a crime. The proof of a conspiracy is generally and properly made by the presentation of objective facts and conduct from which the inference of a meeting of minds in a common purpose is derived. As stated by this Court in *Blumenthal* v. *United States*, 332 U.S. 539, 557:

> * * * Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. * * *

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[8] It should also be noted that the exceptional care with respect to instructing the jury was not reserved for the final instructions but was a characteristic of every stage of the trial, by reason of the alertness and vigor of defense counsel and the conscientious interspersal by the trial judge of illuminating instructions at numerous appropriate stages of the testimony: *e.g.*, the repeated cautions as to evidence concerning particular individuals or types of evidence, R. 250, 264, 282-283, 286-287, 355-356, 650-651, 653, 775-776, 830-831, 1267-1269; and the instructions concerning the motion picture evidence, R. 726-728.

And see *Delli Paoli* v. *United States*, 352 U.S. 232, 236, citing *Glasser* v. *United States*, 315 U.S. 60, 80, *Direct Sales Co.* v. *United States*, 319 U.S. 703, 714, *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664. In view of the challenge here to the conclusions of a properly instructed and patently discriminating jury, it is well to recall the language of Mr. Justice Sutherland in *Manton*, *supra*, at 839 (cited by this Court in *Glasser*, 315 U.S. at 80), pointing out that a criminal conspiracy often—

> will be disclosed only by a development and collocation of circumstances. In passing upon the sufficiency of the proof, it is not our province to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government * * *.

And finally, on this aspect of the case, there is pertinent the equally elementary and established principle that a necessary consequence or aspect of an enterprise can properly be inferred as an objective, and attributed to the conspirators. *United States* v. *Patten*, 226 U.S. 525, 543; *Pereira* v. *United States*, 347 U.S. 1, 12-13. See, also, *Schneider* v. *United States*, 57 F. 2d 454, 456 (C.A. 3).[9]

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[9] Petitioners complain of the remark of the Court of Appeals that the government did not have to prove the non-payment of the tax (Pet. Br. 10, 16-17, 33-35). Since non-payment of the tax was affirmatively proven in this case (see *supra*, p. 16), the remark, in context, merely related, we believe, to the established law that the conspiracy need not be successful, once it is entered into, and overt acts have taken place. The court said (R. 3383-3384):

"* * * With a factual situation such as the evidence here discloses, it will not be presumed nor was the Government required to

In the light of these fundamental rules of conspiracy law, petitioners' attack on the sufficiency of the evidence to show knowledge that a federal tax was due is without merit. Both the record of what was actually done and the necessary inferences from the factual proof demonstrate that it was an agreed part of the operation that the federal taxes, with their accompaniment of registration and public posting of the wagering stamp at the place of business, had to be evaded.

The federal legislation imposed a tax on wagers which would take 10% of the gross (*infra*, p. 50). This in itself might well be a motivation for evading the taxes. But in addition to this major cut in the profit or compensation of the participants, there was the provision that each banker and each of the various writers would have to register with the official in charge of the local internal revenue district—giving not only his own name but also his place of wagering activity and the names and residence of his writers or banker, as the case might be—which registration was specifically provided to be open to the public and available to local prosecutors (*infra*, p. 56). Moreover, books were subject to examination (*infra*, p. 53), changes of location were required to be reported (*infra*, p. 54), and it was required that the payor

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prove that the tax which was payable had not been paid. Conspirators are held to have intended the consequences of their acts, and by purposely engaging in a conspiracy which necessarily and directly produces a prohibited result they are, in contemplation of law, chargeable with intending that result. *United States* v. *Patten*, 226 U. S. 525, 33 S. Ct. 141, 57 L. Ed. 333, 44 L.R.A. N.S. 325. 'The conspiracy is the crime and that is one, however diverse its objects.' *Frohwerk* v. *United States*, 249 U. S. 204, 39 S. Ct. 249, 63 L. Ed. 561; *United States* v. *Manton*, 2nd Cir. 1938, 107 F. 2d 834; cert. den., 309 U. S. 664, 60 S. Ct. 590, 84 L. Ed. 1012."

place and "keep conspicuously" in his place of business the wagering stamp (*infra*, p. 54).

The danger of such requirements to the operation of a lottery is self-evident. This was a large, well-organized enterprise. The operation was once estimated by petitioner Ingram to have been *reduced* to $3,500 per day. In the raid of March 27, 1957, the actual currency found on only two of those found guilty, petitioner Ingram and defendant Christian, was in excess of $9,600. Over 2,000 lottery ticket pads were found, as well as some 500 to 700 paper sacks, thousands of coin wrappers, three radios and six fictitious automobile registrations. At another time, Ingram was seen bringing into the garage office, which was the city pay-off headquarters, two stacks of bills over a foot in height. On the occasion when officers found the constantly shifting out-of-town checkup headquarters, it appeared that this part of the operation required at least four persons (petitioners Smith and Law and defendants Thomas and John Ingram), and three or four adding machines.

The magnitude and organization of the enterprise in itself furnishes a basis for the inference that leading participants would not be unaware of the requirements of federal legislation which had been on the books since 1951. There was, in addition, the special need of this enterprise to keep its operations and locations secret. The conspirators apparently had some hopes of keeping the city police disinterested in their operations. But there was evidence that they knew that investigators of the Solicitor of the County Court were investigating them. Payment of federal taxes, which necessitated compliance with registration and stamp-

posting provisions, would have resulted in disclosure and would therefore have endangered the whole enterprise. The jury was therefore justified in drawing the inference that evasion of federal taxes was a deliberate and essential part of the conspiracy to engage in lottery operations.

The evidence as to efforts to conceal the operation was properly part of the total evidence showing that the failure to pay was deliberate and willful evasion, rather than mere non-payment. The significance of concealment, as an affirmative step of evasion rather than a mere omission, has been stated by this Court in *Spies* v. *United States*, 317 U.S. 492, 499: [10]

> * * * By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as * * * concealment of assets or covering up sources of income, handling of one's affairs to avoid mak-

[10] Petitioners assert that the Court of Appeals below relied "heavily" and erroneously on *Spies* v. *United States*, 317 U.S. 492, "on the theory that the *motive* for concealment was a question to be determined by the jury." (Pet. Br. 5-6, Question 4; Pet. Br. 8, 15, 21-22). Petitioners then seek to distinguish *Spies* as relating only to a determination whether a particular concealment constituted a misdemeanor or a felony. We think that petitioners misconceive the nature and extent of the reliance on *Spies* by the court below and that, in any event, the court was correct in leaving for determination by the jury the factual question of what objectives or motives for concealment were involved in the conspiracy. The court below cited *Spies* after the *second* of the two sentences in the following paragraph (R. 3384):

"The question as to whether the conspiracy was for the purpose of evading and defeating the requirements of the Federal law was for the jury and the jury's verdict has resolved the question. It is immaterial whether there was another purpose or purposes and whether such other purposes were legal or illegal. *Spies* v. *United States*, 317 U.S. 492, 63 L. Ed. 364, 87 L. Ed. 418; *Kobey* v. *United States*, 9th Cir. 1953, 208 F. 2d 583."

> ing the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

We are aware of no authority or reason—nor do petitioners afford any—why the foregoing statement by this Court of a truth that is a matter of common experience and of logic is applicable only to a substantive offense rather than a conspiracy (as contended in Pet. Br. 22).

Petitioners enter into extensive argument (Pet. Br. 29-33) seeking to apply language of *Krulewitch* v. *United States*, 336 U.S. 440, *Lutwak* v. *United States*, 344 U.S. 604, and *Grunewald* v. *United States*, 353 U.S. 391, to the instant case. But the inquiry in those cases as to whether a conspiracy continued *after* the objectives had been accomplished was a totally different one from the question at bar whether the particular concealments were evidence, together with other proof, of what was done in carrying out a conspiracy whose objectives were current, *i.e.*, continuous evasion of all federal tax requirements during all the time of operation of the lottery. In the three cited cases the question was not whether concealment was valid evidence of the nature and agreements of the conspiracy, but whether concealment after achievement of objectives was a part of the original conspiracy or was, instead, a new agreement arising out of new developments or apprehensions. In such cases the concealments and activities that occurred in response

to new developments could be attributed to new agreements. In the instant case, however, the objective was clearly the evasion, *inter alia*, of taxes, in a fully continuing activity—there being no question presented in the Court of Appeals or in this Court as to the duration of the unlawful conspiracy.[11] The weight and purport of the evidence of concealment was thus properly for the jury, for there was no indication of any cessation in the continuing activity or any such accomplishment of a limited objective as would raise a question whether the concealments were divorced from the general pattern and thus designed to meet a new and different eventuality.

Evasion of federal taxes was undoubtedly not the sole object of the conspiracy. But a single conspiracy may have multiple objectives of law violation (*United States* v. *Rabinowich*, 238 U.S. 78, 86; *Frohwerk* v. *United States*, 249 U.S. 204, 210; *Spies* v. *United States*, 317 U.S. 492, 499). So long as it was part of the agreement to evade federal taxes, the conspirators are liable under federal law, regardless of other purposes or other motives. See *Jones* v. *United States*, 251 F. 2d 288 (C.A. 10), certiorari denied, 356 U.S. 919, where the defendants were punished for conspiracy to violate federal law by agreeing to bring liquor into a dry state even though this was only part of a broader scheme for corruption of state officials and division of profits from various illegal enterprises.

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[11] Neither the raid of September 20, 1956, nor the raid of March 27, 1957, seemed successful in stopping the activities, until the indictment in May 1957. The concealments here were all of a pattern and evidentiary of a single conspiracy—the lottery tickets of March 1957 including some of the same writers' symbols as those of December 1955.

Petitioners' argument that the dangers from state laws must be accepted as a reasonable and therefore sufficient explanation of their efforts at concealment (Pet. Br. 20) is based on a misconception. The test is not whether the jury might have found some other purpose. The test is whether the jury could properly find from the evidence, beyond a reasonable doubt, that evasion of federal taxes was *one* object of the conspiracy.

Here, in view of the extent of the operation, which justified the inference that the leading participants would be aware of the duty to pay federal taxes and the danger inherent therein, and considering the fact that federal taxes had not been paid in the years the conspiracy was operating, and the various attempts to conceal the operations from any investigation, the jury had the right to infer that evasion of federal taxes was a necessary part of the whole scheme. That is enough to establish a violation of the federal conspiracy laws.

C. THE FOUR PETITIONERS OCCUPIED SUCH RESPONSIBLE AND INFORMED POSITIONS IN THE ENTERPRISE AS TO PRECLUDE THEIR BEING UNAWARE OF, OR DISAGREEING WITH, THE EVASION OF THE FEDERAL TAXES

Petitioners argue that, as to those who were not themselves liable for the payment of the tax, there is no reason to infer that they knew that non-payment of federal taxes was part of the scheme which they joined. This argument involves only petitioners Smith and Law. It is undisputed that petitioners Ingram and Jenkins were principals in the lottery business, and they do not challenge their conviction upon the

substantive counts of omission to pay the federal wagering taxes and failure to register. There was expert testimony that a lottery banker or "company" was not necessarily an individual but could be a partnership (*supra*, p. 4). These two can properly be held liable for conspiracy, irrespective of the fate of the other two petitioners.[12]

With respect to petitioners Smith and Law, the record discloses such long association and experience and such high responsibility in the confidences and activities of the enterprise as to warrant the conclusion, implicit in the verdict of the jury, that they knew of and participated in the part of the scheme which embraced the evasion of federal taxes. The lottery operation here involved was of a magnitude and nature that would have been impossible without the full agreement and specialized activities and confidence of a number of persons. This was an enterprise which required precision timing, full understanding and agreement, and the ability to rely on at least some of the participants to a degree only possible if their stake and understanding were considerable.

Smith and Law, the jury could properly find, were very important headquarters personnel at the nucleus of the conspiracy. They were observed at the city headquarters at Ingram's garage as early as August 1954. At that time, moreover, Smith was already seen by a "drag man" with petitioner Ingram at the critical place, kept secret each day, where tickets were de-

[12] The liability of petitioners Ingram and Jenkins as conspirators is of course not precluded by their conviction, as well, on the substantive charges. *Pereira* v. *United States*, 347 U.S. 1; *Pinkerton* v. *United States*, 328 U.S. 640, 647; *Heike* v. *United States*, 227 U.S. 131, 144.

livered to persons of the inner circle, to be carried by these persons to the even more secret location of the checkup headquarters. Later, another "drag man" saw both Smith and Law with Ingram as the inner circle of this critical part of the operation.

In the long series of noontime surveillances of the group that gathered by devious routes and in numerous cars to drive to the current checkup headquarters, Smith and Law, together with petitioner Ingram and defendants Thomas and Ruby Ingram, were the permanent nucleus. Smith and Law were both present when the checkup headquarters was at last discovered by officers, and Smith and Law both pleaded guilty to the state lottery offense under false names.

Smith was observed at the city garage headquarters in the later period as well, being present there on every day of the final 1957 surveillances, closeted on occasion with petitioner Ingram behind the closed doors of the office, and seen with the significant sacks and bags of the enterprise. He was observed handing out bills, and he was also identified as the buyer, under fictitious names, of the hundreds of pounds of ham delivered at Ingram's garage in December 1955, for delivery to friendly police. And when defendant Turner was caught with lottery tickets it was Smith who appeared at the courthouse and paid the $1,000 fine and the $100 attorney's fee. Again, when the officers finally raided the garage headquarters in March 1957, Smith was not only present but was caught with part of a lottery ribbon—not merely a ticket—on his person.

The status of petitioners Smith and Law was clearly something far removed from that of a mere "drag man" who would not be entrusted with the location of

the checkup headquarters. As headquarters personnel, they were in a position to wreak havoc if they were not trustworthy, for (as explained in the expert testimony), they were, by that time of the afternoon, informed of the winning number and could write tickets bearing that number and slip them into the computations. The enterprise accordingly required, in its nature as well as its size, the trustworthiness and specialization that only a close and cohesive group could supply.

There was an extensive record of such long-standing association between the participants, often in markedly confidential situations, as to evidence ample opportunity for arriving at a well-defined conspiracy, and for becoming fully informed of the scope and of all necessary objectives of the common enterprise. The inferences are correspondingly strong and, indeed, unavoidable that Smith and Law must have been aware of other critical requirements of the enterprise, including the intent (and actual fact) that the federal taxes and accompanying registration and posting requirements be evaded by means of the same complete secrecy and affirmative concealments that also served as a safeguard against state and local dangers. All, by their studious conduct of concealment, participated in seeking to evade the federal authorities along with the other officials, even though the extent and effect of their efforts varied with the respective individuals.

Moreover, it is of record that the tax was not paid. There is no indication that the participants ever found a wagering stamp posted at the city headquarters. They all could thus know that the tax was unpaid, and there is no indication that any of the participants voiced an objection or evinced any understanding that

the flouting of the federal law was anything but a necessary, understood, and agreed part of the enterprise.

Persistently recurring in petitioners' argument is the effort to split the conspiracy into parts and to absolve conspirators of what they themselves do not directly do, *e.g.*, the suggestion that others cannot be held "accountable" for the banker's failure to pay the tax (Pet. Br. 19). But the essence of conspiracy is a division of labor. Every knowing participant in the whole enterprise is chargeable with all of the objectives of the conspiracy and not merely with the overt acts the particular participant may agree to do. *Blumenthal* v. *United States*, 332 U.S. 539, 557. See, also, *Cruz* v. *United States*, 106 F. 2d 828, 830 (C.A. 10).

Petitioners, in their present argument, persistently disregard the important aspect of high responsibility and close association presented by this record. They ignore the evidence of an association here that was far more extensive, intimate, and responsible than an ordinary employee's relationship, even though every participant was not necessarily a banker or writer. Their repeated references in their brief to pickup men and headquarters personnel disregards the verdict (supported by the evidence) that petitioners Ingram and Jenkins were of such status as banker or principal as to be guilty of substantive offenses as well. Petitioners further ignore the joint activity of these two principals in a whole web of relationships and obvious agreement with the others. And they constantly disregard, as to Smith and Law, the evidence beyond the concealments by these two, disclosing such responsibility and knowledge of the whole extent of the operation as to preclude any lack of knowledge or agreement on their part with

respect to the evasion and defeat of the federal taxes. The jury, which has the right to draw inferences from the testimony had before it ample evidence to support the inference that all four petitioners knew of and participated in the evasion of the federal taxes.

II

The Fact That Two of the Petitioners Were Not Themselves Liable for Payment of the Tax Does Not Absolve Them From Liability for Joining With the Others in a Conspiracy to Evade Payment of the Tax, or Otherwise Render the Conspiracy Statute Inapplicable

A. ONE WHO CANNOT COMMIT THE SUBSTANTIVE OFFENSE MAY BE GUILTY OF CONSPIRACY

Petitioners repeatedly refer to the non-liability of Smith and Law for the actual payment of taxes, as if this somehow relieves these two petitioners of their responsibility for their active participation in the conspiracy which, as we have shown, was properly found to embrace among its objectives the evasion of federal taxes. In view of petitioners' consistent ignoring of the fact, it is well to reiterate that this contention goes only to the liability of Smith and Law, and not to that of Ingram and Jenkins who were found to be principals and who do not challenge their conviction for the substantive offense. But even as to the two petitioners to whom the argument could be said to apply, it has no substance.

The fact that one is not guilty—or not even capable of being guilty—of the substantive offense has never been a grant of a license to conspire with others for commission of the substantive offense (*United States* v. *Holte*, 236 U.S. 140, 145; *Pinkerton* v. *United States*,

328 U.S. 640, 647; *United States* v. *Rabinowich*, 238 U.S. 78, 86; *Gebardi* v. *United States*, 287 U.S. 112, 120-121). In the *Holte* case, this Court held that a woman who is transported in violation of the Mann Act, and who is not capable of committing the substantive offense under that Act, may be guilty of conspiracy with the person transporting her. The Court said (236 U.S. at pp. 144-145):

> We will assume that there may be a degree of co-operation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor was not a crime in the purchaser although it was in the seller. *Commonwealth* v. *Willard*, 22 Pick. 476. But a conspiracy with an officer or employe of the government or any other for an offense that only he could commit has been held for many years to fall within the conspiracy section, now 337 of the penal code. *United States* v. *Martin*, 4 Cliff. 156, 164; *United States* v. *Bayer*, 4 Dillon, 407, 410; *United States* v. *Stevens*, 44 Fed. Rep. 132, 140; *State* v. *Huegin*, 110 Wisconsin, 189, 246. So a woman may conspire to procure an abortion upon herself when under the law she could not commit the substantive crime and therefore, it has been held, could not be an accomplice. The *Queen* v. *Whitchurch*, 24 Q.B.D. 420, 422; *Solander* v. *the People*, 2 Colorado 48, 63; *State* v. *Crofford*, 133 Iowa, 478, 480.

Again, in *Gebardi* v. *United States*, 287 U.S. 112, at 120-121, the Court said:

> Incapacity of one to commit the substantive offense does not necessarily imply that he may with im-

> punity conspire with others who are able to commit it. For it is the collective planning of criminal conduct at which the statute aims. The plan is itself a wrong which, if any act be done to effect its object, the state has elected to treat as criminal. *Clune* v. *United States*, 159 U.S. 590, 595. And one may plan that others shall do what he cannot do himself. See *United States* v. *Rabinowich*, 238 U.S. 78, 86, 87.

Nothing in the decision of this Court in *United States* v. *Calamaro*, 354 U.S. 351, has implied or made necessary any change in this law, and needless to say the Congress has engrafted no exception of this kind on the conspiracy statute (*infra*, p. 50). It may be that where the evidence shows that a particular defendant acted merely as a pickup man in the *Calamaro* sense—a pure messenger—a court might find such evidence alone insufficient proof that the messenger knowingly joined in a conspiracy to evade federal taxes. The question would be as to the evidence of knowing participation, not as to ability to commit the offense. Cf. *Gebardi* v. *United States*, 287 U.S. 112, where this Court held that, although a woman could be guilty of a conspiracy under the Mann Act, evidence of her participation only to the extent of voluntary acquiescence in her transportation was not sufficient to make out her guilt as a conspirator. There is no such question in this case. As discussed *supra*, pp. 39-44, the evidence against Smith and Law, the two petitioners who were not themselves liable for payment of the tax, is not that they were mere employees in a minor capacity who might well have had no knowledge of or interest in the evasion of federal taxes, or whose participation

was limited to mere passive acquiescence. These two petitioners were shown to be in close association and active cooperation with the operators of the whole enterprise; they were part of the central group without whose informed and interested cooperation the conspiracy could not have been successfully carried on. They were at least as important figures in the operation of this conspiracy as were the salesmen in *Blumenthal* v. *United States*, 332 U.S. 539. There is thus no reason why they should be immune from liability for that conspiracy.[13]

B. PETITIONERS' CONTENTION THAT THERE CAN BE NO CONSPIRACY OFFENSE HERE, BECAUSE A LOTTERY OPERATION ITSELF REQUIRES CONCERTED ACTION, MISCONCEIVES BOTH THE NATURE OF THE LOTTERY OPERATION AND THE DOCTRINE OF MERGER.

Inconsistently with their argument that those not liable for the tax cannot be conspirators, petitioners argue that, since Congress subjected only principals and writers to the tax requirements, the particular

[13] Petitioners complain (Pet. Br. 5, Question 3; Pet. Br. 15) that a felony of conspiring is here being found as to Smith and Law upon evidence that resulted in their acquittal of the substantive misdemeanor of failing to pay the tax. The complaint overlooks the fact that the conspiracy charge and conviction were not with respect to the *misdemeanor* of omission to pay taxes but for conspiracy in the *felony* of evading and defeating the taxes, under Section 7201 of 26 U.S.C. (Supp. V), and not Section 7203 (R. 2). Thus, the jury found, upon instructions specifically distinguishing Section 7201 (*supra*, p. 19), that the evidence showed conspiracy to commit the felony. Moreover, the acquittal under the substantive misdemeanor charge was almost certainly not by reason of lack of evidence of the affirmative acts that would have raised the conduct to a felony, but simply because petitioners Smith and Law were not of the class required to do the actual paying, under the statute as interpreted in *United States* v. *Calamaro*, 354 U.S. 351.

offense is of the class of crimes "which, by their very nature, require concert of action," and no prosecution for conspiracy by the intermediaries is permitted (Pet. Br. 23-27).

But it is not intrinsic in the substantive offense involved here that there be a concert of action except, perhaps, with a person buying a number. Bankers and writers can deal directly with one another, and a banker can deal directly with the bettor. Petitioners are thus clearly incorrect in asserting that a "plurality of agents" between the banker and writer are "indispensable elements of the substantive offense" (Pet. Br. 26-27). To the contrary, the very fact that only bankers and writers must pay taxes on the basis of their individual activities negates the contention that conspiracy is a necessary part of the substantive offense.

The indictment charged no bettor with a conspiracy offense. As observed by the Court of Appeals below (R. 3385):

> In support of their contention [petitioners] rely upon the rule that an agreement between buyer and seller, without more, does not establish a conspiracy for an illegal sale of liquor. *United States* v. *Katz*, 271 U.S. 354, 46 S. Ct. 513, 70 L. Ed. 986. A like analogy is drawn from the holding that a woman could not be convicted of conspiring to violate the Mann Act when she was the person to be transported with her consent across a state line unless some other ingredient was present. *Gebardi* v. *United States*, 287 U.S. 112, 53 S. Ct. 35, 77 L. Ed. 206, 84 A.L.R. 370. If this were a case where one who had purchased a lottery ticket was con-

tending that he could not be convicted of being a conspirator the argument might be persuasive. It is not such a case. * * *

And see *Woods* v. *United States*, 240 F. 2d 37, 40-41 (C.A. D.C.), certiorari denied, 353 U.S. 941; *Pifer* v. *United States*, 245 F. 2d 704, 705 (C.A. 4). Moreover, in *United States* v. *Lutwak*, 195 F. 2d 748, 755-756 (C.A. 7), affirmed, 344 U.S. 604, it was clearly pointed out that no merger occurs where, as here, parties are involved in the conspiracy other than those who committed the substantive offense.

Petitioners Ingram and Jenkins, themselves liable for the federal taxes, conspired with others to evade such taxes. Petitioners Smith and Law were active, responsible participants in that conspiracy. All, therefore, were properly convicted.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

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MARCH 1959.

APPENDIX

The pertinent statutory provisions are as follows:

18 U.S.C. 371:

. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

26 U.S.C. (Supp. V) 4401, 68A Stat. 525: [14]

Imposition of tax.

(a) *Wagers.*

There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) *Amount of wager.*

In determining the amount of any wager for the purposes of this subchapter, all charges incident

[14] For an earlier version of this legislation, see Act of October 20, 1951, Sec. 471 (65 Stat. 529) made effective on November 1, 1951, by Sec. 472 (65 Stat. 531).

to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U.S.C. (Supp. V) 4403, 68A Stat. 525:

Record Requirements.

Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to section 6001 (a).

26 U.S.C. (Supp. V) 4411, 68A Stat. 527:

Imposition of tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. (Supp. V) 4412, 68A Stat. 527:

Registration.

(a) *Requirement.*

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) *Firm or company.*

Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) *Supplemental information.*

In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

26 U.S.C. (Supp. V) 4413, 68A Stat. 527:

Certain provisions made applicable.

Sections 4901, 4902, 4904, 4905, and 4906 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation referred to in such sections. * * *.

26 U.S.C. (Supp. V) 4423, 68A Stat. 528:

Inspection of books.

Notwithstanding section 7605 (b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.

26 U.S.C. (Supp. V) 4901, 68A Stat. 593:

Payment of tax.

(a) *Condition precedent to carrying on certain business.*

No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), * * * until he has paid the special tax therefor.

* * * * *

26 U.S.C. (Supp. V) 4905, 68A Stat. 594:

Liability in case of death or change of location.

(a) *Requirements.*

* * * When any person removes from the house or premises for which any trade or business was taxed to any other place, he may carry on the trade or business specified in the register kept in the office of the official in charge of the internal revenue district at the place to which he removes, without the payment of any additional tax: *Provided*, That all cases of death, change, or removal, as aforesaid, with the name of the successor to any person deceased, or of the person making such change or removal, shall be registered with the Secretary or his delegate, under regulations to be prescribed by the Secretary or his delegate.

* * * * *

26 U.S.C. (Supp. V) 6806 (c), 68A Stat. 831:

* * * * *

(c) *Occupational wagering tax.*

Every person liable for special tax under section 4411 shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Treasury Department.

26 U.S.C. (Supp. V) 7201, 68A Stat. 851:

Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. (Supp. V) 7203, 68A Stat. 851:

Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. (Supp. V) 7272, 68A Stat. 866:

Penalty for failure to register.

(a) *In general.*

Any person who fails to register with the Secretary or his delegate as required by this title or by

regulations issued thereunder shall be liable to a penalty of $50.

* * * * *

26 U.S.C. (Supp. V) 6107, 68A Stat. 756:

List of special taxpayers for public inspection.

In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

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SUPREME COURT OF THE UNITED STATES

No. 457.—October Term, 1958.

Horace Ingram, L. E. Smith, Mary Law, et al., Petitioners, v. United States of America. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 29, 1959.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioners and twenty-two others were indicted and tried for conspiracy to evade and defeat the payment of the federal taxes imposed on lottery operations. The petitioners and six others were convicted.[1] Their convic-

[1] Section 4401 of the Internal Revenue Code of 1954 provides:

"(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof. . . .

"(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery." 68A Stat. 525.

Section 4411 of the Code provides: "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable." 68A Stat. 527.

Section 4421 of the Code includes in the definition of "wager" "any wager placed in a lottery conducted for profit" and includes in the definition of "lottery" "the numbers game, policy, and similar types of wagering." 68A Stat. 528.

Section 7201 of the Code provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony. . . ." 68A Stat. 851.

18 U. S. C. § 371 provides: "If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more

tions were affirmed by the Court of Appeals. 259 F. 2d 886. Certiorari was granted to examine the scope of the conspiracy statute in the context of these provisions of the Internal Revenue Code. 358 U. S. 905.

At the trial it was established by overwhelming evidence that the petitioners had engaged with numerous others in a closely organized and large-scale operation of the numbers game in Atlanta, Georgia, during the years 1954 to 1957, the period covered by the indictment.[2] That activity is a criminal offense under Georgia law.[3] The evidence also established in intricate detail that the participants in this large-scale enterprise had, through a variety of carefully planned stratagems, made every effort to conceal its operation.[4] Finally, the evidence showed that none of the petitioners had paid any of the federal taxes in question. There was no direct evidence to show that any of the petitioners knew of these taxes.

In addition to the conspiracy count, the indictment under which the petitioners were tried also contained two additional counts charging them with the substantive

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of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned. . . ." 62 Stat. 701.

These were the links in the statutory chain under which the petitioners were indicted and convicted.

[2] Some of the items found when the headquarters of the operation was raided in 1957 were clearly indicative of the magnitude of the enterprise. Among the items found on that occasion were some 2,400 scratch pads of the type used in numbers operations, thousands of coin wrappers, a police alarm radio, with a secret code of police calls, two high-frequency radios, and six fictitious automobile registrations with license tags. Petitioner Ingram was alleged to have stated in 1955 that the "business is down to about" $3,500 per day.

[3] Georgia Code of 1933, Title 26–6502.

[4] There was extensive evidence, for example, that participants in the enterprise used false license plates on their automobiles, took evasive routes to the "check-up headquarters" of the operation, used false names on occasion, and attempted to bribe local law enforcement officers.

offenses of willful failure to pay the special tax imposed by § 4411 of the Internal Revenue Code,[5] in violation of § 7203 of the Code,[6] and of failure to register as required by § 4412 of the Code,[7] in violation of § 7272 of the Code.[8] The trial took place subsequent to the announcement of this Court's decision in *United States* v. *Calamaro*, 354 U. S. 351, and the district judge correctly instructed the jury that conviction of the substantive offenses would be justified only as to any defendants found to be "writers," "bankers," or to have "a proprietary interest in such lottery operation." Two of the petitioners, Ingram and Jenkins, were found guilty on both substantive counts and do not question these convictions, conceding the sufficiency of the evidence to show that Ingram was the banker and that Jenkins had a proprietary interest in the enterprise. The evidence showed that the other two petitioners, Smith and Law, were relatively minor clerical functionaries at the headquarters of the operation, and they were acquitted on the substantive counts.

In sum, what this record presents then is a picture of a large-scale and profitable gambling business conducted in Atlanta over a period of several years by petitioners Ingram and Jenkins. The business involved many participants, including the petitioners Smith and Law. It was a business made criminal by the laws of Georgia, and everyone in the organization participated in trying to keep its operation secret. Ingram and Jenkins were liable for

[5] See Note 1, *supra*.

[6] This section of the Code provides: "Any person required under this title to pay any . . . tax, . . . who willfully fails to pay such . . . tax, . . . shall . . . be guilty of a misdemeanor. . . ." 68A Stat. 851.

[7] This section of the Code provides: "Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district— . . . ." 68A Stat. 527.

[8] This section of the Code provides: "Any person who fails to register with the Secretary or his delegate as required by this title . . . shall be liable to a penalty of $50." 68A Stat. 866.

the federal taxes imposed by §§ 4401 and 4411 of the Internal Revenue Code and willfully failed to pay them. They were required by § 4412 of the Code to register with the official in charge of the Internal Revenue District, and they failed to do so. Smith and Law were not themselves subject to any of the taxes here involved. The question presented is whether this factual foundation is sufficient to support a conviction of the petitioners, or any of them, for conspiracy to attempt to evade or defeat federal taxes, "the gravest of offenses against the revenues." *Spies* v. *United States*, 317 U. S. 492, 499. We hold that it was sufficient as to Ingram and Jenkins, and insufficient as to Smith and Law.

As to Ingram and Jenkins, the record is clear. They were entrepreneurs in a vast and profitable gambling business. They were clearly liable for the special taxes and registration requirements that the Federal Government has imposed upon the operators of that kind of business. *United States* v. *Kahriger*, 345 U. S. 22. Not only did they willfully fail and neglect to pay these taxes, but they conspired to conceal the operation of the business and the source of the income upon which the tax is imposed.

In *Spies* v. *United States* this Court had occasion to consider the quantum and type of evidence required to support a conviction for the substantive offense of attempting to defeat or evade federal taxes as contrasted with the lesser proof required to convict of the misdemeanor of willfully failing to file a return or to pay a tax. It was there said:

> "Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.
>
> "Congress did not define or limit the methods by which a willful attempt to defeat and evade might

be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." 317 U. S., at 499.

In *Spies*, the Court was dealing with the substantive offense, not with a conspiracy to commit it. But the evidence of agreement between Ingram and Jenkins to operate this gambling enterprise, which operation made them liable for federal taxes, and to conceal its operation and its income is clear on this record, and is virtually conceded by the petitioners. The evidence was sufficient to support a conclusion that they were engaged not only in a conspiracy to operate and conceal their gambling enterprise, but that they were also parties to an agreement to attempt to defeat or evade the federal taxes imposed upon the operators of such a business.

As to Smith and Law, the case is quite a different one. While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal that operation from local law enforcement agencies, we find no warrant for a finding

that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal under federal law. Certainly there is nothing in the record to show that Smith and Law knew that Ingram and Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter.

It is fundamental that a conviction for conspiracy under 18 U. S. C. § 371 cannot be sustained unless there is "proof of an agreement to commit an offense against the United States." *Pereira* v. *United States*, 347 U. S. 1, 12. There need not, of course, be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of the proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason of the gambling operation. "Without the knowledge, the intent cannot exist." *Direct Sales Co.* v. *United States*, 319 U. S. 671, 711.

"[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." [9] The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of federal taxes, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge of willfulness. *Spies* v. *United States*, *supra*. Cf. *United States* v. *Falcone*, 311 U. S. 205.

Indulging, as of course we must, in that view of the evidence most favorable to the Government, we simply cannot discern adequate foundation in the present record for a finding that Smith and Law had such knowledge of Ingram's and Jenkins' wagering tax liability. The record is completely barren of any direct evidence of such knowledge. It was not shown, for example, that any reference

[9] See "Developments in the Law—Criminal Conspiracy," 72 Harv. L. Rev. 920, at 939, and authorities there cited.

had ever been made by any of the petitioners to possible tax liability, or that they had filed a return or paid a tax in previous years. The Government relied instead upon evidence which, it asserts, circumstantially proved the requisite knowledge on the part of Smith and Law. These circumstances were simply the intimate connection of Smith and Law with the operation of the lottery itself, their cooperation in conducting it secretly,[10] and their apparent knowledge that it was conducted at a profit. The Government points out that not only would payment of the taxes have decreased the profits to be derived from operation of the lottery, but in addition would have required registration, including the names and addresses of the bankers and writers, with the local internal revenue office and the posting of a wagering tax stamp at the place of business. 26 U. S. C. (Supp. V) §§ 4412, 6806 (c). The information contained in the registration would have been available to local law enforcement officials. 26 U. S. C. (Supp. V) § 6107.

Yet these circumstances actually are colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes. Certainly the secrecy of the operation did not go to show that knowledge. This is not a case where efforts at con-

[10] The Court's decisions in *Grunewald* v. *United States*, 353 U. S. 391; *Lutwak* v. *United States*, 344 U. S. 604; and *Krulewitch* v. *United States*, 336 U. S. 440, do not, as petitioners appear to contend, prevent the jury from treating this subsidiary objective as an element of the conspiracy. Those cases hold only that the life of the conspiracy cannot be extended by evidence of concealment after the conspiracy's criminal objectives have been fully accomplished. "... [A] vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." *Grunewald* v. *United States*, *supra*, at 405.

cealment would be reasonably explainable only in terms of motivation to evade taxation. Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted. A conspiracy, to be sure, may have multiple objectives. *United States* v. *Rabinowich*, 238 U. S. 78, 86, and if one of its objectives, even a minor one, be the evasion of federal taxes, the offense is made out, though the primary objective may be concealment of another crime. See *Spies* v. *United States*, *supra*, at 499. But the fact that payment of the federal taxes by Ingram and Jenkins might have resulted in disclosure of the lottery and subsequent prosecution of Smith and Law by local authorities would permit an inference that concealment of the lottery was motivated by a purpose to evade payment of federal taxes only if, independently, there were proof that Smith and Law knew of the tax liability. Evidence that Smith and Law might have wanted the taxes to be evaded if they had known of them, and that they engaged in conduct which could have been in furtherance of a plan to evade the taxes if they had known of them, is not evidence that they did know of them.

What was said in *Direct Sales Co.* v. *United States* on behalf of a unanimous Court is of particular relevance here:

> "Without the knowledge, the intent cannot exist . . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal . . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." 319 U. S., at 711.

Smith and Law were not liable for the wagering tax. *United States* v. *Calamaro*, *supra*. They could not, therefore, have been convicted of the crime which they

were charged with having conspired to commit. To sustain their conviction on this record would make of the crime of conspiracy just that "dragnet to draw in all substantive crimes" against which the Court warned in *Direct Sales*. Cf. *Gebardi* v. *United States*, 287 U. S. 112.

Accordingly, while affirming the convictions of Ingram and Jenkins, we hold that the motions for acquittal of Smith and Law should have been sustained by the District Court, and that the Court of Appeals was in error in affirming their convictions.

Judgment accordingly.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 457.—October Term, 1958.

Horace Ingram, L. E. Smith, Mary Law, et al., Petitioners, v. United States of America. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 29, 1959.]

Mr. Justice Harlan, whom Mr. Justice Douglas and Mr. Justice Brennan join, concurring in part and dissenting in part.

The constitutional validity of the occupational tax provisions on persons engaged in the business of accepting wagers has been established by *United States* v. *Kahriger*, 345 U. S. 22. In construing those provisions, however, we have held that no weight can be given to the suggestion that they must be interpreted on the premise that their enactment was "'in part motivated by a congressional desire to suppress wagering.'" *United States* v. *Calamaro*, 354 U. S. 351. In that case we held that only "writers," "bankers," or those who have "a proprietary interest" in a lottery operation are subject to the taxing statutes, and that therefore only those persons can be held for violation of their substantive provisions.

In this case the Government has in effect sought to bypass *Calamaro* by the simple expedient of indicting persons connected with a lottery operation not for the substantive offenses proscribed by the Internal Revenue Code, but instead for conspiring with those members of the lottery operation who are personally subject to the relevant excise taxes to evade payment of those taxes. Two essential elements of the crime, *first*, knowledge that the taxes are due, and, *second*, a "willful and positive attempt to evade tax in any manner or to defeat it by

any means," *Spies* v. *United States*, 317 U. S. 492, 499, are sought to be established here by the naked fact that the lottery operation was carefully concealed by all who participated in it. Since lotteries are unlawful in virtually every State, more particularly in Georgia where this enterprise was carried on, and therefore require concealment if they are to continue to operate, to permit a conviction on such evidence alone would relegate *Calamaro* to the status of an unmeaningful relic. The opinion of the Court convincingly demonstrates why the evidence in the case does not support a finding by the jury that petitioners Smith and Law knew that a tax was owing by petitioners Ingram and Jenkins, and that they undertook acts of concealment for the purpose, in whole or in part, of aiding an evasion of that tax.

But I think that the very considerations which lead the Court to reverse the conviction of Smith and Law equally require a reversal as to Ingram and Jenkins. An indispensable element of the crime of tax evasion is knowledge that a tax is imposed. This knowledge may be proved directly or circumstantially. Here there is no direct proof, and the sole circumstantial evidence relied on by the Government is the fact of concealment of the lottery operation. But if, as the Court holds, "certainly the secrecy of the operation did not go to show . . . knowledge" by Smith and Law that their superiors were liable for a federal tax, I am at a loss to understand how this factor can at the same time suffice to show knowledge on the part of petitioners Ingram and Jenkins that they themselves were liable for a federal tax. The latter no less than the former must be shown to have actual knowledge that a tax is owing before they can be convicted of a conspiracy to evade that tax, and the Court's reasoning plainly demonstrates to me that the Government has made no such showing in this case.

I think that sight has been lost of the fact that this is a prosecution for conspiracy to violate a federal taxing statute, not for violation of local gambling laws. An overwhelming showing has been made that petitioners were participants in a large lottery enterprise, but that does not suffice to support conviction of the crime with which they are here charged.